IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-410

UNION NACIONAL DE TRABAJADORES AND COMITE ORGANIZADOR OBREROS EN HUELGA DE CATALYTIC,
Petitioners,
V.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

UNION NACIONAL DE TRABAJADORES AND ITS AGENT, ALCIDES SERRANO,
Petitioners,
V.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

UNION NACIONAL DE TRABAJADORES AND ITS AGENT, ARTURO GRANT,
Petitioners,
V.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

UNION NACIONAL DE TRABAJADORES AND ITS AGENT, ARTURO GRANT,
Petitioners,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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September 13, 1976

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Petitioners, Unión Nacional de Trabajadores, Comité Organizador Obreros en Huelga de Catalytic, Alcides Serrano and Arturo Grant, respectfully pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the First Circuit, entered in the above-captioned cases on June 21, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is not yet officially reported. It is printed in the Appendix at p.152a. The opinions of the National Labor Relations Board are Unión Nacional de Trabajadores and Comité Organizador Obreros en Huelga de Catalytic (Catalytic Industrial Maintenance Company, Inc.), and Unión Nacional de Trabajadores (Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.), reported at 219 NLRB #66 and printed in the Appendix at p.100a; Unión Nacional de Trabajadores and its Agent, Alcides Serrano (Jacobs Constructors Company of Puerto Rico), reported at 219 NLRB #65 and printed in the Appendix at p.69a; Unión Nacional de Trabajadores and its Agent, Arturo Grant (Macal Container Corporation), reported at 219 NLRB #67 and printed in the Appendix at p.9a; Unión Nacional de Trabajadores and its Agent, Arturo Grant (The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc.), reported at 219 NLRB #157 and printed in the Appendix at p.30a. 1/

1/ For the sake of clarity, the cases before the
(footnote continued on next page)

JURISDICTION

Petitioners were found guilty in four separate cases charging violations of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. Sec. 158(b)(1)(A), 2/ following trials held before Administrative Law Judges of the National Labor Relations Board 3/ in Puerto Rico. In Catalytic petitioners were also found guilty of violating Section 8(b)(4)(i) and (ii)(B) of the Act, 29 U.S.C. Sec. 158(b)(4)(i) and (ii)(B).

Exceptions to these decisions were taken to the Board in Washington, D.C. pursuant to Section 10(c) of the Act, 29 U.S.C. Sec. 160(c). The Board affirmed the law judge decisions and issued broad remedial orders including extraordinary mailing and publication requirements. In addition, the certification previously granted petitioner Unión Nacional de Trabajadores at Carborundum Company was revoked.

The Board then applied for enforcement of its orders to the United States Court of Appeals for the First Circuit. The Circuit Court consolidated the four cases and granted enforcement. A partial dissent was filed by Judge Campbell. No rehearing was requested.

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National Labor Relations Board will be hereinafter identified by the name of the charging party, i.e., 219 NLRB #66 will be referred to as Catalytic; 219 NLRB #65, as Jacobs; 219 NLRB #67 as Macal; and 219 NLRB #157 as Carborundum.

2/ The National Labor Relations Act as amended, 29 U.S.C. Sec. 151 et seq, is referred to hereinafter as the "Act."

3/ Hereinafter referred to as the "Board."

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Board's revocation of a union's certification duly granted under Section 9 of the Act, based on a finding that the union committed unfair labor practices, without the Board providing either notice or hearing, and without the courts having jurisdiction to review said action, violates the Due Process clause of the Fifth Amendment and the policy and mandates of the Act?

2. Whether the procedures used in trials of unfair labor practice violations of the Act which do not provide for translation of English testimony into Spanish for the benefit of Spanish-speaking charged parties who do not understand English violate the Due Process and Equal Protection clauses of the Fifth Amendment?

3. Whether the issuance of an order which broadly enjoins future unfair labor practices based solely on the finding that similar violations have been committed in the past, without finding the existence of a continuing unfair labor practice or a generalized scheme to violate the Act, is beyond the statutory powers of the Board?

4. Whether in a Board unfair labor practice proceeding a party has been given sufficient notice of the charges against it, as required by the Due Process clause of the Fifth Amendment, when even though the complaint does not specify or call into question anything other than the specific violation charged or allege the existence of a generalized scheme to violate the Act, the Board issues a broad remedial order admittedly based upon violations which occurred in cases outside the scope of the complaint?

5. Whether the enormous overbreadth of a broad remedial order issued by the Board which does not provide specific notice of what conduct is prohibited, but enjoins coercion of employees "in any manner," violates the Due Process clause and Rule 65(d), Federal Rules of Civil Procedure, and is so vague as to impinge upon protected First Amendment activity?

6. Whether the Board's imposition of a broad order as punishment for the openly expressed beliefs of union agents that the Board does not have jurisdiction or authority over Puerto Rico is an impermissible abridgment of First Amendment rights by an agency of the government?

7. Whether, in a remedial order, the use of extraordinary mailing and publication requirements which are not reasonably designed to reach and inform the employees involved but go much beyond the bounds necessary to remedy the unfair labor practices, especially in that the publication requirement's principal purpose is to reach millions of people not affected by the practices in any way, is a punishment prohibited by the Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First and Fifth Amendment, which are printed at p.1a of the Appendix.

2. Sections 1, 7, 8(b)(1)(A), 9, 10(a) and 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. Sections 151, 157, 158(b)(1)(A), 159, 160(a) and 160(c), which are printed in the Appendix at pp.2a-7a.

3. Rule 65(d), Federal Rules of Civil Procedure, which is printed at p.8a of the Appendix.

STATEMENT OF THE CASE

Petitioners herein were charged with committing unfair labor practices in four separate cases brought pursuant to the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 et seq. Each of the cases, heard before Region 24 of the National Labor Relations Board in Puerto Rico, charged the Unión Nacional de Trabajadores and its agents 4 / with violation of Section 8(b)(1)(A) of the Act, 29 U.S.C. Sec. 158(b)(1)(A). 5 / The charges concern a period of approximately one year, from November, 1973 to September, 1974. 6 /

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4 / Reference to the Unión Nacional de Trabajadores (hereinafter the "Union") is meant to encompass the other petitioners as well, who were named in the complaints only in their capacities as agents of the Union. They will not be separately referred to except where clarity otherwise demands.

5 / Section 8(b)(1)(A) prohibits a labor organization from restraining or coercing employees in the exercise of their rights to participate in or refrain from concerted activities and choice of collective bargaining representative. (p.3a) These rights are enumerated in Section 7 of the Act, 29 U.S.C. Sec. 157. (p.3a)

In Catalytic, the Union was also charged with violation of a secondary boycott provision of the Act, Section 8(b)(4)(i) and (ii)(B), 29 U.S.C. Sec.158(b)(4)(i) and (ii)(B). This petition is not directly concerned with that charge.

6 / The charges against the Union were for what the Board characterized as violent conduct. They range from implied threats to picket line skirmishes and assaults. The Union challenged the factual basis of these charges up to and including the level of the Court of Appeals. Understanding that the scope of review is very limited and the legal issues,which are of the utmost importance,

(footnote continued on next page)

All the proceedings in these cases were conducted exclusively in English. The Board's policy in all formal hearings is not to translate from English into Spanish, except when a witness does not speak or understand English well enough to testify in that language. Testimony, arguments and rulings are not translated into Spanish for the benefit of a Spanish-speaking party; the charged party is not provided with an interpreter. Consequently petitioners, who do not speak English, did not understand the bulk of the proceedings they were subjected to.

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can be decided even accepting the facts as found by the Court, the Union is not here pursuing its challenge to the specific factual findings of the Board. Accordingly, the specific allegations will not be described in detail herein; they are, however, set forth in the Court of Appeals opinion which may be found starting at p.152a of the Appendix.

The following chart shows the dates that the various decisions were issued:

	Catalytic	Jacobs	Macal	Carborundum
CHARGE FILED	11/26,28,29/73	4/8/74	4/24/74	9/19/74
COMPLAINT ISSUED	1/2/74	6/7/74	6/10/74	10/15/74
TRIAL	1/29/74 5/24/74	7/18/74	8/6/74	11/7/74
ADMINISTRATIVE LAW JUDGE DECISION	9/30/74	9/26/74	10/31/74	2/13/75
BOARD DECISION	7/23/75	7/23/75	7/23/75	7/30/75

Each of the cases was tried separately before a different Administrative Law Judge, who, in turn, issued a decision and a recommended order. Upon the filing of exceptions by the parties, the Board reviewed these decisions and issued a final order. For the most part, the Board did not make new findings, but only affirmed the rulings, findings and conclusions of the Judges. 7 / One important difference between the Judges' decisions and the Board's decisions is that, while the Judges could not consider the conduct in the cases that were still pending, the Board could, for it decided three cases simultaneously and the fourth a week later. 8 /

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7 / In Carborundum where the case against the Union was consolidated with a complaint charging that the employer had unlawfully refused to bargain in violation of Section 8(a)(5) of the Act, 29 U.S.C. Sec. 158(a)(5), the Board reversed the Judge's finding that the employer had violated the Act. In some of the cases against the Union, the Board made certain minor findings of fact different from those of the Judges, but these differences did not affect either the holdings or the scope of the orders as recommended by the Judges.

8 / The Board did not use this fact, however, to alter the findings of the Judges to any significant degree with respect to the breadth of the orders issued. In Jacobs and Carborundum the Board did not modify the broad order at all and did not make any additional findings in support of the scope of the recommended orders. In Catalytic and Macal the Board broadened the scope of the recommended orders, but did so substantially for the same reasons the Judges had used in making their recommendations.

Following basically the same lines of reasoning, the judges in each case recommended the issuance of a broad order. 9 / The broad order was based on the finding that the unfair labor practice violation in the case being considered was similar to that which the Union was found to have committed in Unión Nacional de Trabajadores and its Agent Radames Acosta Cepeda (Surgical Appliances Mfg., Inc.), 203 NLRB #11 (1973). 10 / Thus the position was expounded that a broad order is appropriate any time there had been a previous adjudication of a similar unfair labor practice, even where the latter violation was in no way related to the former.

In Catalytic the Judge stated:

> "The nature and extent of the restraint and coercion exerted by respondents through violence and threats of violence shown in this case and in the Surgical Appliances case, however, show that they have adopted

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9 / Regular Board orders only enjoin the specific acts found to be illegal at the employer's plant where the violation was found. The orders in these cases are considered broad orders either because they also enjoin coercion "in any other manner," or because they also apply to "employees of any other employer," or for both reasons.

10 / Surgical Appliances also involved charges that the Union violated Section 8(b)(1)(A) of the Act. The Union did not contest the Board's charges, and a default order was entered. The Board has nowhere asserted that the Union did not voluntarily abide by that order or that the order was ineffective to prevent a repetition of the practices found with respect to that case.

these practices as part of their normal method of carrying on their activities."
(p.119a)

The Judge thus made it clear that the only necessary factor for the issuance of a broad order was that the conduct be of the same type as that previously found (p.120a). He did not find that the Union was involved in a generalized scheme to violate the Act or that the Union was involved in ongoing violations of the Act persuasively related to those found in the case before him.

In affirming the Judge's findings and conclusions, the Board passed up the opportunity to make further findings concerning the scope of the recommended order or the existence of a generalized scheme. (p.129a) The Board did, however, broaden the order to enjoin the Union from in any other manner restraining employees in the exercise of their rights under Section 7 of the Act. The Board gave its reasons for this modification as:

1. The Union's repeated violations of the Act, whose authority it refuses to recognize.11 /
2. The nature and extent of the unlawful conduct in the Surgical Appliances, Jacobs and Macal cases. 12 /

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11 / This often repeated phrase is obviously a reference to the Union's openly expressed position that the Board lacks a legal basis to exert jurisdiction over Puerto Rico.

12 / In Jacobs and Macal, issued the same day as Catalytic, the Board characterized the Union's conduct in the different cases as being "similar" in nature. (p.25a, 95a n.3)

The Board concluded that such modification was necessary "to better effectuate the policies of the Act and serve the public interest." (p.132a n.71) The Board made no finding, explicit or otherwise, that the Union was engaged in a generalized scheme to violate the Act or involved in ongoing unfair labor practices at other employers.

The decision in Jacobs was almost a duplicate of Catalytic. The Judge issued a broad order because:

"the violations found in the present case are of the same type as and very similar to those which the Union was found to have committed in the Surgical Appliances case." (p.86a).

The Judge in Macal made no findings whatsoever with respect to the broad order, except that it was recommended by the General Counsel. The Board affirmed the Judge's order without making further findings and then expanded the order to include employees of any other employer in Puerto Rico, using as its basis that the Union had committed "similar" violations in Jacobs and Catalytic. (p.23a)

In recommending the issuance of a broad order in Carborundum, the Judge stated:

"In view of a similar pattern of violence in which the Board found this same union engaged in Surgical Appliances, Inc., 203 NLRB #11 (1973), and in view of the open and pervasive character of the violence and threats found herein, I find that a proclivity on the part of the Union to violate the Act has been established and that a broad order is appropriate." (p.50a).

With respect to the breadth of the order, the Board affirmed the Judge's findings and conconclusions without making further findings about the nature of the practices. (p.58a)

The Board, by adopting the Judges' orders in Jacobs and Carborundum and expanding the ones in Catalytic and Macal, issued four orders of maximum breadth, each requiring the Union to cease and desist from restraining or coercing employees of any employer in Puerto Rico in any manner from exercising their rights under Section 7 of the Act.

Citing the similar violations by the Union in the other cases, and the refusal of the Union to recognize the authority of the Act, the Board added two extraordinary remedial provisions to the orders. It required the Union to mail a prescribed notice to each employee of the companies involved, and it required the publication of the notices in every newspaper of general circulation in Puerto Rico.

In addition to the broad orders and other extraordinary remedies imposed on the Union, the Board revoked the Union's certification at the Carborundum Company. (p.64a) 13 / Its reasons for this unprecedented action were the same as those for the issuance of the other provisions of the order: the Union's history of "aggravated misconduct" as shown by the Carborundum case and the previously decided cases, and the Union's stated opposition to the Board's jurisdiction over Puerto Rico. (p.62a-63a)

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13 / The Union was certified as the exclusive collective bargaining representative of the employees at Carborundum on May 22, 1974, following an election supervised by the Board. (p.32a)

The Board immediately petitioned the Court of Appeals for the First Circuit for judicial enforcement of the orders. The Court of Appeals consolidated the four cases. On June 21, 1976, it granted enforcement and upheld all but one of the Board's findings. 14 / The Court, with little discussion, found that the scope of the broad order and the extraordinary mailing and publication requirements were proper. Finally, although expressing concern over the Board's unprecedented revocation of the Union's certification, the First Circuit agreed with the Board that it lacked jurisdiction to review that aspect of the order.

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14 / The Court held that a speech made by Union president Arturo Grant which had allegedly included a threat to tear down the Carborundum Company's gates was within the bounds of protected speech and therefore not unlawful coercion of employees. (p.165a)

REASONS FOR GRANTING THE WRIT

I

THE PETITION PRESENTS FOR REVIEW A QUESTION OF STATUTORY INTERPRETATION INVOLVING IMPORTANT ISSUES OF CONSTITUTIONAL LAW AND NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER THE LABOR BOARD CAN REVOKE THE CERTIFICATION OF A UNION FOR A VIOLATION OF THE ACT, WITHOUT PROVIDING NOTICE OR HEARING, AND WITHOUT THE COURTS HAVING JURISDICTION TO REVIEW THE REVOCATION.

In an unprecedented claim, the Board asserts that it has the power to revoke a duly granted certification whenever it determines that a union has committed an unfair labor practice violation involving "aggravated misconduct." (p. 62a) The Court of Appeals, although expressing its concern "that the Board's approach may be breaking new ground with insufficient sensitivity expressed on the record to the interests at stake" (p. 173a), found that it did not have jurisdiction to review that aspect of the Board's remedy because American Federation of Labor v. NLRB, 308 US 401 (1940) had decided that certification proceedings under Section 9 of the Act, 29 U.S.C. Sec. 159, are not final orders and thus not subject to judicial review. However, under the circumstances of this case, the Court should have granted review and determined that the revocation was improper.

The policy of our labor laws is to encourage the practice and procedure of collective bargaining and to protect the exercise by employees of full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of collective bargaining and other mutual aid and protection. Section 1 of the Act, 29 U.S.C. Sec. 151 (p. 2a). See also NLRB v. Jones & Laughlin, 301 US 1 (1937); Republic Steel

Corp. v. NLRB, 311 US 7 (1940); Virginia Electric and Power Company v. NLRB, 319 US 533 (1943). In order to implement this policy, the Act provides a procedure where a majority of employees in a unit can choose a labor organization to serve as exclusive representative of all the employees in that unit. Section 9, 29 U.S.C. Sec. 159. (p. 3a-6a)

The Board does not have discretionary power either to certify or not to certify a union duly chosen by a majority of the employees. Once the Board finds that a question concerning representation exists, the statute provides that "it shall direct an election by secret ballot and shall certify the results thereof." Section 9(c)(1), 29 U.S.C. Sec. 159(c)(1), (emphasis added). The Act, therefore, mandates that the Board certify a union which is properly chosen under Section 9. If the Board could revoke a certification for any reason it chose, immune from judicial review, this statutory command would be meaningless.

The Court has previously recognized this problem with respect to another part of Section 9 and has held that a court may review Board action when it is in excess of the delegated powers under the Act. Thus, where the Board failed to follow the non-discretionary command that it hold separate elections in units which include professionals, the Court reviewed and reversed the Board's decision. Leedom v. Kyne, 358 US 184 (1958).

Congress has established an elaborate procedure to insure that employees can freely choose their representative. The Board has exceeded its statutory authority here by holding, in effect, that the employees' Section 9 right to have their chosen union certified could be forfeited for any violation of the statute. No such disability is authorized by the Act. See Gutknecht v. United States, 396 US 295 (1970). Certification grants important statutory rights to the union and to

the employees, NLRB v. District 50, UMW, 355 US 453 (1958), which, once granted, may not be arbitrarily revoked at the discretion of the Board for any substantive reason it may decide. Cf. Kent v. Dulles, 357 US 116, 128-9 (1958). This unbridled discretion, which the Board now claims for itself, constitutes "a type of administrative absolutism not congenial to our lawmaking traditions." Gutknecht v. United States, supra at 307.

Board certification creates protected rights concerning liberty and property. Such rights can be created by statutory decree. Board of Regents v. Roth, 408 US 564 (1972). The associational rights of employees are controlled by the certification requirement. Certification also creates property rights, for along with a union's certification goes the authority to enter into an exclusive contract with the employer on behalf of all the employees. Absent certification under the Act, this authority does not exist.

Under the claim of absolute discretion to grant or revoke certifications, the Board usurps the power to extinguish these rights at will. There is a total absence of regulations or standards propounded by the Board by which the legality of such actions can be judged. Indeed, the Board revoked the Union's certificate without notice that such action was contemplated nor with opportunity for a meaningful hearing. Once a protected property or liberty right has issued, procedural due process is mandatory; notice and opportunity to be heard must be afforded before the termination becomes effective. Bell v. Burson, 402 US 535, 542 (1971). See also Arnett v. Kennedy, 416 US 134, 167 (Powell, J., concurring). Here no due process guarantees were ever provided.15/

15/ The Act provides procedures through which
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The revocation is further reviewable, since it was intended as a remedy for the Union's unfair labor practices. In discussing the revocation, the Court of Appeals could not avoid considering it as an unfair labor practice remedy.16/ The Board itself places the revocation in the same category as the broad order and other extraordinary remedial provisions, all deemed warranted because of the Union's past unfair labor practice violations. Compare p.63a n.5 with p.64a n.8.

In addition, the Board asserts that the revocation "best serves the purposes of the Act" (p. 64a). That language is not found in Section 9, but in Section 10(c), 29 U.S.C. Sec. 160(c), (p. 6a-7a), which authorizes the Board to formulate

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employees, dissatified with their chosen representative, may petition the Board to decertify it. Section 9(c)(A)(ii), 29 U.S.C. Sec. 159(c)(A)(ii). There is no indication that the employees had tried to invoke that procedure or were dissatisfied with the Union. Thus, the Board substituted its judgement, exercised without due process protections, for the statutory procedures established by the Act, which do provide for notice and hearing.

16/ The Court suggests that should this problem come before the Board again, it should "explicitly find that no alternative remedy - either Section 8(b)(1)(A) remedies or any order delaying bargaining until the union provides adequate assurance that the misconduct will not recur - will be an equally effective means of protecting the values of the Act." (p. 172a) The Court also stated that "a principal factor in the Board's decision apparently was its belief that revoking the Union's certificate would be an effective means of remedying the pervasive and flagrant misconduct at other Puerto Rican jobsites." (p. 173a)

remedies for unfair labor practices. See NLRB v. District 50, UMW, 355 US 453 (1958).

The Courts of Appeals, under Sections 10(e) and (f) of the Act, 29 U.S.C. Sec. 160(e) and (f), may review the scope of remedies used in unfair labor practice cases. See, e.g., Communications Workers of America v. NLRB, 363 US 479 (1960), NLRB v. District 50, UMW, supra. The fact that such an order concerns a representational matter does not insulate it from the Court's review. See, e.g., NLRB v. Gissel Packing Co., 395 US 575(1969). In fact, Section 9(d) of the Act, 29 U.S.C. Sec. 159(d) contemplates review of a certification "in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice authorized by Section 10(c)." American Federation of Labor v. NLRB, supra at 406. Thus,where the revocation of certification has been included as an unfair labor practice remedy, it is reviewable by the Court.

Unquestionably, disestablishment orders, which by necessity affect certification, are judicially reviewable. Consolidated Edison v. NLRB, 305 US 197 (1938); Wallace Corp. v. United States, 323 US 248(1944). Under the circumstances of this case the revocation is equivalent to an order of disestablishment, despite the failure of the Board to treat it as such. Cf. NLRB v. District 50, UMW, supra. For that reason the order is reviewable.

If the Court of Appeals had reviewed the revocation, reversal would have been required. Disestablishment of a union is appropriate "only in the case of a dominated union where free choice of a truly representative union is impossible under any circumstances." NLRB v. District 50, UMW, supra at 460. Removal of a union under a lesser consideration would be against the policy of the Act, which is to insure employees free choice of representative. Local 57, Garment Workers v. NLRB,

374 F.2d 295 (D.C. Cir. 1967). See also Consolidated Edison v. NLRB, supra at 238.

The revocation is beyond the Board's power under Section 10(c) of the Act. "The Board must establish that the remedy is a reasonable attempt to put aright matters the unfair labor practice set awry." Local 60, Carpenters v. NLRB, 365 US 561 (1961)(Harlan, J., concurring). The Board pretends to remedy coercion of employees to effectuate the policies of the Act, but it has eliminated the employees' statutory rights to select their own representative and to negotiate a collective bargaining agreement. They had enjoyed both of these rights before the imposition of the Board's "remedy."

The revocation is essentially negative in character and only serves to punish the Union for its unfair labor practice indiscretion. See Local 57, Garment Workers v. NLRB, supra at 300.17/ A penalty is outside the Board's delegated powers "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Consolidated Edison v. NLRB, supra at 235-236; Republic Steel Corp. v. NLRB, 311 US 7, 11-12 (1940).

This Court's intervention is warranted in this case because the Circuit Court erroneously interpreted the statute as depriving it of authority to review the Board's revocation of the Union's certification. This need is further compelled by the Board's underlying action which, without due process of law, eliminated the statutorily granted rights of employees in direct contradiction to the stated policy of the Act. As this is the first

17/ The real victims are the employees who had just gone through an arduous fight with their employer to win representational and collective bargaining rights.

time that the Board has so acted, the Court should provide needed guidance to the lower courts and to the Board.

II

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW DECIDED BY THE CIRCUIT COURT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, NAMELY, WHETHER THE PROCEDURES USED AT BOARD TRIALS OF UNFAIR LABOR PRACTICE VIOLATIONS OF THE ACT AT WHICH ENGLISH TESTIMONY IS NOT TRANSLATED INTO SPANISH FOR SPANISH-SPEAKING CHARGED PARTIES VIOLATES THE RIGHTS OF DUE PROCESS AND EQUAL PROTECTION.

The language of Puerto Rico is Spanish. Regardless of their American citizenship, more than half of the population of Puerto Rico is unable to speak English at all.18/ Indeed, no one is required to have the least elementary knowledge of that language. Since 1945 Spanish has been the exclusive medium of instruction in Puerto Rican schools. See Leibowitz, English Literacy: Legal Sanction for Discrimination, 39 Rev. Univ. of P.R. 313, 334 (1970). In 1965, the Supreme Court of Puerto Rico ruled that only Spanish could be used in judicial proceedings in Commonwealth Courts. People v. Superior Court, 92 P.R.R. 580, 588-89 (1965).

Despite this reality, all formal proceedings before the Board in Puerto Rico are conducted exclusively in English. Spanish-speaking parties, including charged parties, are not provided translators. As the Court of Appeals noted, "The Board's practice in these hearings was to utilize translators whenever a witness did not understand or speak English well enough to testify in English." (p. 153a n.3) This meant that all testimony in English, as well as all arguments and rulings, were not translated for the benefit of petitioners who, although fluent in Spanish, do not speak or understand English. The Board pro-

18/U.S. Bureau of Census, Department of Commerce, 1970 U.S. Census, Table 42, Service and Social

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cedures therefore lacked even the most rudimental elements of due process fairness.

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 US 385, 394 (1914), cited in Goldberg v. Kelly, 397 US 254, 267 (1970). "The hearing must be 'at a meaningful time and in a meaningful manner.'" Armstrong v. Manzo, 380 US 545, 552. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra at 268-69. These requirements were not met by the Board procedures, since much of the testimony against petitioners was not comprehensible to them by virtue of the fact that it was presented in a language they did not understand. The right to hear testimony of individuals in a hearing is of particular importance. Greene v. McElroy, 360 US 474, 496 (1959).

Especially important to the guarantee of due process is the right to confront witnesses. "In almost every setting where important decisions turn on question of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, supra at 269. See also I.C.C. v. Louisville & N.R. Co., 227 US 88, 93-94 (1913); Greene v. McElroy, 360 US 474, 496-97 (1959); Willner v. Committee on Character and Fitness, 373 US 96 (1963); Pointer v. Texas, 380 US 400 (1965).

Petitioners, who did not have sufficient mastery of the English language to comprehend what a witness who testified in English actually said, could not,under the present Board system where testimony and other statements in English

(footnote continued from previous page)
Characteristics-Puerto Rico, October, 1972.

were not translated into Spanish, exercise their right to confront witnesses testifying against them. Their mere presence in the courtroom did not ensure this right; the statutory and constitutional dictate that the petitioners must hear the testimony of the adverse witnesses can hardly be satisfied by subjecting them to meaningless "babble." United States ex rel. Negron v. New York, 434 F.2d 386, 388 (2 Cir. 1970),affirming 310 F.Supp 1304 (E.D. N.Y. 1970).

The Court of Appeals concluded that the due process problems created by this failure to translate the proceedings were not significant because petitioners' interest was only to avoid a civil sanction. (p. 153a n.3) Our jurisprudence does not permit such a flagrant sacrifice of protected due process rights because a civil rather than a criminal interest is at stake. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases (citing cases), but also in all types of cases where administrative and regulatory actions were under scrutiny (citing cases)." Greene v. McElroy, supra at 497. In essentially holding that petitioners do not have the right to understand the testimony against them in Board proceedings because they are civil in nature, the First Circuit ignored the Court's teaching that "(c)ertain fundamental rights" are guaranteed "to all, to those who speak other languages as well as those born with English on the tongue." Meyer v. Nebraska, 262 US 390, 401 (1923).19/

19/ During the Senate hearings on the Bilingual Courts Act, it was clearly expressed that due process requires full translation even in civil cases.

> "Senator Burdick: (W)hat is the theory behind this legislation as it applies to civil cases?

(footnote continued on next page)

The rationale of Carmona v. Sheffield, 325 F.Supp 1341 (D.C. Calif. 1971), affirmed 475 F.2d 738 (9 Cir. 1973), (cited by the First Circuit) does not apply to the present case. The Court there decided that it was not necessary to provide Spanish-language material on unemployment insurance to a minority of Spanish-speaking residents who had voluntarily integrated into a California community on the basis that "the United States is an English-speaking country." 325 F.Supp at 1342. Puerto Rico, on the other hand, is officially a Spanish-speaking country. Governmental benefit programs in Puerto Rico, such as unemployment insurance, could not reasonably be administered in English. The same is true of the labor relations laws. However, when it comes to Board formal proceedings, where a party generally has more at stake, only English is

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> Senator Tunney: Well, Mr. Chairman, in my mind the results of a court proceeding in a civil action can be as onerous to a party as those of in action in a criminal proceeding. I think we are all aware of the fact that a person's property is not at the same level of importance as his life or his liberty, but it is not far behind. In many instances you have a substantial impact upon a person's property rights - to the degree that a person's whole life can be changed by the winning or the losing of a lawsuit." (95)

Hearings on S. 1724 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93d Cong. 2d Sess., p. 22.

used. 20/

The essence of equal protection of the laws is that persons similarly situated should be treated alike. Yet, Puerto Ricans are afforded unequal treatment from other citizens of the United States. Citizens in states whose language is English are given Board proceedings in English. But United States citizens in Puerto Rico, whose official and natural language is Spanish are denied both Board proceedings in Spanish and translations of English proceedings into Spanish.

The Spanish-speaking United States citizens of Puerto Rico is certainly a suspect classification, since the language distinction is based on the race, economic status and the national origin of Puerto Ricans. See McLaughlin v. Florida, 379 US 184 (1964). Racial classifications are constitutionally suspect. Bolling v. Sharpe, 347 US 497, 499 (1954). They are subject to the most rigid scrutiny. Korematsu v. United States, 323 US 214 (1945). Equal protection of the laws cannot be realized in Puerto Rico through the use of English with no translation into Spanish.

Moreover, the First Circuit's reasoning in United States v. DeJesus-Boria, 518 F.2d 368 (1 Cir. 1975) is not applicable to the proceedings before the Board for two important reasons: whereas in the Federal District Court in Puerto Rico, English testimony and Court proceedings are translated into Spanish for the benefit of the

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20 / At least one court arrived at the opposite conclusion from that reached in Carmona v. Sheffield, supra, on the basis of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000 d. Pabon v. Levine, No. 75 Civ. 1067 (S.D. N.Y., March 15, 1967), reported at Clearinghouse Review 18,141.

non-English-speaking party, English testimony and arguments at a Board hearing are not. Furthermore, whereas the "judges sitting regularly in the District Court for the District of Puerto Rico are bilingual," United States v. DeJesus-Boria, supra at 371 n.2, the Administrative Law Judges sitting at Board hearings in Puerto Rico have no knowledge of the Spanish language. The constitutional guarantees which are given to a non-English-speaker at the Federal District Court in Puerto Rico are not present at Board hearings.

The petition should be granted to determine a question of fundamental importance to the working people of Puerto Rico, the vast majority of whom do not speak English. The rights involved here, of which a whole class of United States citizens is being deprived, are rights basic to the fair administration of our laws. This Court's intervention is necessary to correct a wholly unconstitutional practice which is admittedly Board procedure. It is not likely to be changed without this Court's action.

III

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION AS TO WHICH THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS, NAMELY, WHETHER THE BOARD MAY ISSUE A BROAD ORDER TO REMEDY AN UNFAIR LABOR PRACTICE IN THE ABSENCE OF A FINDING OF A GENERALIZED SCHEME TO VIOLATE THE ACT.

Under Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), the Board is granted wide discretion in fashioning remedies for unfair labor practices. NLRB v. Fibreboard Paper Products Corp., 379 US 203 (1964), and is not confined to a "rigid scheme of remedies." Phelps Dodge Corp. v. NLRB, 313 US 177, 194(1941). However, the Board's power "is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued or persuasively related to proven unlawful conduct." NLRB v. Express Publishing Co., 312 US 426, 433 (1941). See also NLRB v. Teamsters Local 85, 458 F.2d 222 (9 Cir.1972). The enforcement of a broad order will be granted only where the record supports a finding of a "generalized scheme" to violate a section of the Act. Communications Workers of America v. NLRB, 362 US 479 (1960). See also NLRB v. Local 476, Plumbers, 280 F.2d 443 (1 Cir. 1960); NLRB v. Dallas General Drivers, 228 F.2d 202 (5 Cir.1960); Carpenters v. NLRB, 286 F.2d 539 (D.C. Cir.1960); NLRB v. Longshoremen, 283 F.2d 568 (9 Cir.1960); NLRB v. International Brotherhood of Electrical Workers, 491 F.2d 838 (2 Cir.1974); Culinary Workers v. NLRB, 501 F.2d 794 (D.C.Cir.1974).

The judicial insistence that a broad order be predicated on a responsible finding of a generalized scheme to violate the Act is firmly based in the exigencies of the statutory mandate. Section 10(a) of the Act, 29 U.S.C. Sec. 160(a), (p. 6a), empowers the Board "to prevent any person from engaging in any unfair labor practice." However,

this does not give the Board the authority to prospectively enjoin the commission of an unfair labor practice not yet found to exist. The Board's power over unfair labor practices is only remedial. Consolidated Edison v. NLRB, 305 US 197, 236 (1938). In interpreting this section of the Act, Chief Justice, then Judge, Burger explained,

> "it seems quite clear that this means the Board may stop an actively continuing unfair labor practice that has been discovered and adjudicated as distinguished from a general deterence of unfair labor practices."
> Local 57 Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir. 1967) at 303-304.21/

A broad order, by its very nature, encompasses conduct other than the specific acts found to be unfair labor practice violations. But the Board may enjoin the other, future conduct only upon finding that it is a continuance of the unfair labor practice already found to exist. The existence of a generalized scheme is thus a necessary element to show that the illegal conduct which may occur in the future is part of a plan to continue the previously adjudicated unfair labor

21/ Section 10(j) of the Act, 29 U.S.C. Sec. 160 (j) permits the Board to go into court to seek a temporary injunction under certain conditions, when it has reasonable cause to believe that an unfair labor practice is being committed. Thus, even this Section which permits the Board to try to enjoin violations which have not yet been adjudicated contemplates a determination, with all the judicial safeguards, that a practice is ongoing, not merely possible.

practice which the Board is authorized to prevent 22/

The Court of Appeals for the District of Columbia expressed this fundamental, stating: "In the absence of substantial evidence on the record in any of these cases that the proven unfair labor practices were part of a generalized scheme to violate the Act, we continue to disfavor these broad orders." Culinary Workers v. NLRB, 501 F.2d 794 (D.C. Cir. 1974).

The "substantial evidence" of a generalized scheme cannot be met by the mere finding that similar violations have occurred. The unfair labor practices in Culinary Workers v. NLRB, supra, involved violations of the same section of the Act, concerned several different employers, and took place in the context of a publicized drive to unionize area restaurants. Nevertheless, the Court rejected a broad order because neither the similarity nor the repetition of the unfair labor practices, without more, proved that the union was engaged in a generalized scheme to violate the Act. Id. at 802. See also Local 70 IBT (C & T Trucking), 191 NLRB 11 (1971).

22/ The Board refers to something it calls "proclivity" as justifying the issuance of a broad order. This term, which it fails to define, clearly falls far short of a finding of a generalized scheme. It does not necessitate that future violations either be persuasively related to or an ongoing part of the violation found to exist. It seems to be, instead, a judgement as to the inherent nature of the Union: whether it has some mystical tendency to violate the Act. Indeed, the Board holds that all that is needed to show this proclivity is two or more violations of the Act by the same party. Thus the finding of proclivity is nothing more than the finding that the Union has previously violated Section 8(b)(1)(A) of the Act.

An element which shows more than mere similarity must be demonstrated to be present to prove the existence of a generalized scheme. Generally, this is provided when an announced or implicit policy has been found to exist on the basis of the evidence in the record. NLRB v. Springfield Building & Construction Trades Council, 262 F.2d 494 (1 Cir. 1958); NLRB v. Milk & Dairy Employees Local Union 584, 341 F.2d 29, 33 (2 Cir. 1965).23/

The Board's decisions in the present cases lack both findings of the existence of a generalized scheme and substantial evidence capable of supporting such findings. In Catalytic, Jacobs and Carborundum, the Board approved the Administrative Law Judges' findings that similar conduct in two cases was sufficient to support a broad order. It is precisely this rationale, which eliminates the need for finding a generalized scheme, that the Court rejected in Culinary Workers v. NLRB, supra:

> "We do not believe that two previous Board unfair labor practices against a union without more prove that it is engaged in a generalized scheme to violate the Act."
> 501 F.2d at 802.

And where, as here, there was voluntary compliance with the previous Board order,24/ the Board itself has previously expressed disapproval of use of a broad order. Local 70 IBT, supra, Plumbers & Pipefitters Local 42 et al., 169 NLRB 840, 840 n.1 (1968).25/

The Board did not make findings in addition to those made by the Administrative Law Judges concerning the broad order provisions of the remedy and consequently never found a generalized scheme to exist. In fact, even where the Board increased the breadth of the order recommended by the Judges, it did so only on a finding that the Union had engaged in "similar" conduct elsewhere (p. 25a).26/

23/ Repetition alone is not a sufficient foundation to base a finding of a generalized scheme. Compare, e.g., Plumbers and Pipefitters Local 198, 183 NLRB 478(1970) with Plumbers and Pipefitters Local 198, 185 NLRB 582(1970)(similar violations of the secondary boycott provisions). Compare, also, General Electric Company, 186 NLRB 911(1971) with General Electric Company, 188 NLRB 920(1971)(similar violations of Section 8(a)(5) of the Act /29 U.S.C. Sec. 158(a)(5)/ with respect to the same union). Although repetition of similar acts was found in these cases, no broad orders were imposed.

24/ Surgical Appliances, supra.

25/ Nor is the Catalytic Judge's rationale correct, that a broad order is appropriate whenever needed to restrain violence. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 US 287 (1941) does not stand for the proposition that an order may broadly enjoin unrelated prospective, violent conduct directed at different employers. In issuing the injunctions in Meadowmoor, the Court emphasized that it was justified "only by the violence that induced it and only so long as it counteracts a continuing intimidation." The majority carefully noted that the injunction was proper only because its effect was limited to one employer and to ongoing acts. 312 US at 298.

26/ To sustain the prohibition of "in any manner," the Board is required to find that the Union has violated Section 8(b)(1)(A) in some other manner. NLRB v. Express Publishing Co., supra; International Typographers Union, Local 38 v. NLRB, 278 F.2d 6, 14-15 (1 Cir. 1960). However, no such findings were made. In fact, the finding that the acts were "similar" excludes the finding that they were done in another manner.

This Court has never approved a Board order of equal breadth. In International Brotherhood of Electrical Workers v. NLRB, 341 US 694 (1951), the Board was permitted to use a broad order to enjoin that union from the continuing practice of using secondary boycotts to pressure the same primary employer. While a violation of Section 8(b)(4) involving actions against various secondary employers may be sufficient in itself to show the existence of an ongoing unfair labor practice, to wit, the intention to pressure a particular primary employer through boycotts of the suppliers, a violation of Section 8(b)(1)(A) with regard to employees of different employers does not, without more, tend to show the existence of an illegal strategy. "(I)f a union has coerced employees of certain employers in violation of Section 8(b)(1), while attempting to organize them, evidence that the coercion was part of a program to use similar tactics against employees of other employers might properly be required for enforcement of an order extending beyond the unfair practices found." (emphasis added) Note, 72 Harvard Law Rev. 1577, 1580 (1959).

The Board found that the Union committed four similar, but independent, unfair labor practice violations. It has not found the existence of a generalized scheme.27/ The Board puts forward

27/ Nor would it be sufficient even if the Board could possibly have made such a finding. This Court has long held that orders of administrative agencies cannot be upheld merely because findings might have been made, "There must be such a responsible finding." Security & Exchange Commission v. Chenery Corp., 318 US 80, 94 (1943). Cf. Textile Workers of America v. NLRB, 475 F.2d 973, 976 (D.C. Cir. 1973).

that Section 10(a) gives it the power to enjoin future, unadjudicated violations of the Act without the need for these violations either to be proven part of an ongoing unfair labor practice or to be persuasively related. The only nexus it would require is that the conduct be similar.

This petition is presented to the Court in the posture that there is a clear conflict at least between the D.C. Circuit and the First Circuit with respect to the findings the Board must make to support the issuance of a broad order. Moreover, no uniform application of standards concerning broad orders exists among the other circuits. In light of the Board's increasing use of this remedy and the lack of clear, controlling precedent, guidance by this Court is necessary.

IV

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW DECIDED BY THE FIRST CIRCUIT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, NAMELY, WHETHER BOARD COMPLAINTS WHICH DO NOT ALLEGE A GENERALIZED SCHEME GIVE SUFFICIENT NOTICE OF THE CHARGES INVOLVED TO PERMIT USE OF A BROAD ORDER.

The broad order, to be a valid exercise of the powers under the Act, must be based on an allegation that the Union is engaging in a generalized scheme to violate the Act. That charge has a substantial impact, for it permits the Board to issue an order of much greater breadth than it can when remedying a simple violation. A defense against a charge of a generalized scheme is necessarily different than a defense to a single violation. 28 /

However, the Board never included this charge in any of the four complaints although it could have easily done so. The Union was never put on notice that its conduct concerning anything more than the allegations in the case being tried was in issue. The Board made an ex parte determination that violations of the Act outside of the scope of the complaint were relevant to the factual question of the Union's intent to commit future unfair labor practices, but never provided the Union with notice of this added charge nor with opportunity to offer evidence rebutting it. "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of

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28 / For example, to prove a generalized scheme, intent must be shown; on the other hand, the question of intent is irrelevant to prove a single violation.

facts decisive of rights.... (And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 170-172 (Frankfurter, J., concurring)." Fuentes v. Shevin, 407 US 67 (1972). 29 /

The requirements of due process notice and hearing apply to proceedings of the Board just as they do to other administrative hearings which determine basic rights. A party will not be found guilty of a violation which has not been specifically charged, NLRB v. Sands Mfg. Co., 306 US 332 (1939), NLRB v. Ford Motor Co., 119 F.2d 326 (5 Cir. 1941), Reliance Mfg. Co. v. NLRB, 125 F.2d 311 (7 Cir. 1941). The Court has also refused to invalidate contracts where there was no notice that they were under attack. Consolidated Edison v. NLRB, supra. Since the order represents

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29 / The First Circuit found that even were adequate notice required, the Union could not have been prejudiced by failure to receive it, since the findings were predicated on other proceedings and could not have been attacked (p.167a n.9). While the Union might not have been able to challenge the findings, it could have offered new evidence to shed light on the interpretation of those findings. The Union was surely prejudiced by the lack of opportunity to show, for example, that the violations were of an isolated nature and clearly not part of a generalized scheme when considered together with the Union's extensive history of peaceful organizing. The purpose of notice and hearing would specifically have been to allow the Union, in any way it could, to meet the charge of generalized scheme which was levelled against it.

what a party has been found guilty of, it cannot permissibly be drawn broader than the complaint. 30 / Cf. Cole v. Arkansas, 333 US 196 (1948). This Court should grant the petition to assure that this aspect of the due process guarantees - that a person has the right to receive notice of all the charges involved - be applied in Board proceedings.

30 / The Board's practice of amending the complaint at the end of the trial to conform to the evidence offered is not being questioned. However, the evidence used to support the broad orders herein was never offered; the Board considered it only after the trials had closed.

V

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW DECIDED BY THE CIRCUIT COURT IN CONFLICT WITH APPLICABLE DECISIONS BY THIS COURT, NAMELY, WHETHER THE ORDERS BECAUSE OF THEIR ENORMOUS OVERBREADTH, FAIL TO PROVIDE SUFFICIENT NOTICE OF WHAT CONDUCT IS PROHIBITED AND THUS ALSO IMPINGE ON PETITIONER'S PROTECTED FIRST AMENDMENT ACTIVITY.

Remedial orders issued by the Board must meet the requirements of Rule 65(d), Federal Rules of Civil Procedure. Regal Knitwear Co. v. NLRB, 324 US 9, 13 (1945). This rule requires that the act or acts to be enjoined be specifically described in reasonable detail. The vagueness of such terms as "in any other manner" in an injunctive order fails to satisfy the due process requirements mandated by Rule 65.

Since the violation of a Board order is on pain of contempt and may have criminal consequences, the terms of the order must be set out with specific clarity. NLRB v. Teamsters Local 327, 419 F.2d 1282 (6 Cir. 1970). See generally, International Harvester Co. v. Kentucky, 234 US 216 (1914), Connally v. General Const. Co., 269 US 385 (1926), Grayned v. City of Rockford, 408 US 104, 108 (1972).

The orders in the present cases were drafted by the Board to be broad enough to cover any possible violation of Section 8(b)(1)(A) which might occur in the future. The acts which are prohibited are not specified nor are they required to be related to the acts found to have been committed. Because of the range of speech and action which falls within these undefined bounds, it is impossible for the Union to anticipate the legality or illegality of its conduct. The orders thus render the Union virtually

incapable of organizing or representing employees at all. 31/ See International Longshoremen's Assn. Local 1291 v. Philadelphia Marine Trade Assn., 389 US 64, 68-75 (1967).

The enormous overbreadth also impinges on First Amendment rights. Any statutes or orders, whether legislative, administrative, or judicial in origin, must be narrowly drafted to avoid First Amendment infringement, and if alternative methods are available, First Amendment restrictions are not to be employed. Cantwell v. Connecticut, 310 US 296, 311 (1940). The least drastic means of accomplishing the desired end must be utilized. Shelton v. Tucker, 364 US 479 (1960). The organizational activity engaged in by unions is wholly dependent on the exercise of these freedoms. See Hague v. CIO, 307 US 496 (1939); Thornhill v. Alabama, 310 US 88 (1940); Thomas v. Collins, 323 US 516 (1945); Allee v. Medrano, 416 US 802, 815 (1974).

The Board's orders virtually eliminate the Union's rights to organize by making First Amend-

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31/ Even some of the "specific" provisions of these orders are too vague and generalized. For example, the order in Macal enjoins threats of assault or "other damage to employees..." (p.25a) If the employees now refuse to cross a legal picket line, may the Union be punished for contempt because they suffered damage, i.e., loss of wages? Moreover, these restraints also apply as to "anyone else." Does this include a consumer who sustains "other damage" because the Union's legal strike delayed the delivery of an ordered product?

Of course, the major concern is with the enormous overbreadth of the order pertaining to conduct in "any other manner," and subsequently magnified by its application to "employees of any other employer."

ment activity too perilous to be freely engaged in. This Court has often explained that one of the principal infirmities of vagueness in the First Amendment area is the inhibiting effect on the exercise of protected activities. Cramp v. Board of Public Instruction, 368 US 278 (1961), Baggett v. Bullitt, 377 US 372 (1964). See also Stromberg v. California, 283 US 359, 360 (1931); Herndon v. Lowry, 301 US 242 (1937); Smith v. California, 361 US 147 (1959).

The potential inhibiting effect of an overly broad order on the rights of employees to self-organization has long been recognized. "The holding [not to issue a broad order under Section 8(b)(1)(A)], however, appears to be based on a more general view that the threat of contempt for violation of such a broad order would significantly inhibit the union's organizational activities, which are particularly favored by the Act...." Note, 72 Harvard Law Review 1557, 1559 (1959). The language of the present orders is so vague and imprecise as to include activities which are clearly protected by the First Amendment. They cannot be construed with sufficient narrowness to avoid the constitutional infirmity. 32/

The danger in these orders is obvious from the facts of these cases before the Court. For example, in Macal the Judge found that a coercive threat "had been implied about two weeks earlier in the leaflet that Ortiz was asked to carefully read." (p.18a). There is nothing in the record

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32/ For example, the order would seem to cover picketing. Often picketing has the intention of putting group pressure on employees to join with their colleagues in the concerted activity. Couldn't this be considered as falling within the ambit of coercion in any manner?

which indicates that the leaflet was anything more than an accurate portrayal of actual incidents. However, the Board's message comes across clearly: in the future the Union may only pass out leaflets at the risk that an accurate statement may result in a contempt citation. 33/

The Union must risk contempt for activities ranging from calling a primary strike to engaging in pure speech. This can have no other effect than to chill the Union's legitimate and protected activity. NLRB v. Express Publishing Co., supra at 433. International Typographers Union v. NLRB, 278 F.2d 6 (1 Cir. 1960). The Union will certainly have to steer very wide of any activity, even pure speech, which might be considered coercive, since any charged violation of Section 8(b)(1)(A) will be tried as a contempt in court in the first instance no matter how unrelated it is to earlier activity.

This threat is quite real for these orders constitute the same type of blanket order proscribed in NLRB v. Express Publishing Co., supra. In that case the Court struck down the broad order because a whole spectrum of unrelated conduct could also have led to a violation of the order and a subsequent contempt citation. That order was based on a violation of Section 8(a)(1) of the Act. Though not exactly co-extensive, Section 8(a)(1) and Section 8(b)(1) are meant to cover the same conduct. Capital Services Inc. v. NLRB, 204 F.2d 848 (9 Cir. 1953), aff'd. 347 US 501 (1954). See also Local 12 Rubber Workers v. NLRB, 368 F.2d 12, 21 n.14 (5 Cir. 1966), National Labor Relations Board, 40th Annual Report (1975), p.113.

33 / This was later found not to be an unfair labor practice, but only because the person receiving the leaflet was not an employee at the time. Presumably, had Union agents leafletted an employee, they would have been found guilty of coercion.

Any types of union interference with employee rights is encompassed by Section 8(b)(1)(A). In its latest annual report, the Board set forth recent important cases concerning this section. Of the cases noted, one involved a premature collective bargaining renewal, one involved the imposition of fines on former union members who had resigned, and one concerned a union's refusal to represent a laid-off employee in a job reassignment dispute. 40th Annual Report, supra at 114. Not one of the cases cited by the Board involved conduct similar to that found to have been committed by the Union. The list of distinct and dissimilar ways in which Section 8(b)(1)(A) can be violated is virtually endless. 34 /

Thus, the enforcement of these orders will effectuate the total substitution of the extraordinary remedy of contempt for the Board's procedures of adjudicating Section 8(b)(1)(A) unfair labor practice violations. The Union will be prospectively denied access to Board trial and appeal procedures and instead faced with the summary and narrow determination of contempt. Furthermore, the resulting contempts will shift primary

34 / See, e.g., NLRB v. Local 4 Operating Engineers, 456 F.2d 996 (1 Cir. 1972) - union discriminated in hiring hall referrals; NLRB v. Pepsi-Cola Bottling Co., 454 F.2d 5 (6 Cir. 1972) - union signed contract before attaining majority status. Fort Smith Outerwear, Inc. v. NLRB, 499 F.2d 223 (8 Cir. 1974) - union waived initiation fee to encourage employees to sign authorization cards. Since these cases, as well as the cases cited by the Board's report, involve Section 8(b)(1)(A) violations, they would be included in the scope of the order against the Union. If the Union committed any of these violations, it could be held in contempt.

responsibility for the formulation of labor policy from the Board to the courts. See NLRB v. Bandman Iron Co., 281 F.2d 787 (6 Cir. 1960), International Brotherhood of Teamsters v. NLRB, 262 F.2d 456 (D. C. Cir. 1958).

Nor can it be said that the Union is protected by the possibility of a narrowing construction. A contempt trial is not the proper stage to work out the details of what conduct is covered by a decree. NLRB v. Seven-Up Bottling Co., 344 US 344 (1953); J.I. Case Co. v. NLRB, 321 US 332, 341 (1944). "The judicial contempt power is a decisive weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." International Longshoremen's Assn. v. Philadelphia Marine Assn., supra at 75.

This case involves the failure of the First Circuit to apply the normal standards of due process precision to injunctive orders of the Board, especially those which touch the area of First Amendment rights. To assure uniform application of these fundamental principles, the instant petition should be granted.

VI

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW DECIDED BY THE CIRCUIT COURT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, NAMELY, WHETHER UNDER FIRST AMENDMENT STANDARDS THE BOARD CAN PUNISH PETITIONERS BY SUBJECTING THEM TO A BROAD INJUNCTIVE ORDER ON THE BASIS OF THEIR EXPRESSION OF OPPOSITION TO THE JURISDICTION AND AUTHORITY OF THE BOARD OVER PUERTO RICO.

The broad orders involved in these cases were issued by the Board to punish petitioners for expressing their belief that the Board lacks jurisdiction over Puerto Rico. This type of sanction by an administrative agency of the government is an impermissible intrusion into rights protected by the First Amendment.

At the trials, petitioners openly testified about their belief that the Board lacks authority to operate in Puerto Rico.35/ They believed that their position was politically and juridically valid.36/ They did not realize that their beliefs

35/ Not only was this an official position of the Union approved by the membership at its convention, but it was also the subject of major litigation by the Union before the United States District Court for the District of Puerto Rico. United States v. Unión Nacional de Trabajadores et al, Cr. 73-164 (D.P.R.).

36/ In NLRB v. Security National Life Insurance Co., 494 F.2d 336 (1 Cir. 1974), the First Circuit upheld the Board's jurisdiction over Puerto Rico based on either the interstate commerce clause or the territorial clause of the Constitution. However, neither of these provisions applies to Puerto Rico. The Union further contends
(footnote continued on next page)

would be used by the Board as a justification for the imposition of increased civil sanctions.

Undoubtedly the petitioners' ideas are unpopular with the Board. But statements of opposition to the government, as well as to its policies and procedures, enjoy the protection of the First Amendment. Bond v. Floyd, 385 US 116 (1966), Schacht v. United States, 398 US 58, 62-63 (1970). It is generally the controversial statements which most need First Amendment protection, for the non-controversial does not often come under attack.

The Board, several times, refers to the Union's refusal to recognize the authority of the Act as justifying the use of the extraordinary remedies against the Union (p.63a n.6, 87a n.6).37/

(footnote continued from previous page)
that the Act is locally inapplicable, thus taking it out of the ambit of the Compact between Puerto Rico and the United States. In fact, the proposed Compact of Permanent Union between Puerto Rico and the United States(August 1, 1975) would have eliminated the Board's jurisdiction over Puerto Rico.

37/ Union organizer Castro-Ramos did state that he did not recognize the authority of the law or the Board, but within the context he was speaking it is apparent that he was referring to his beliefs about the jurisdiction of the Act. His statements to this effect were made as responses to general, hypothetical questions, many of which were elicited by the Judge.

The Board places great significance on Castro-Ramos' statement in Jacobs that when the laws cannot be applied in a manner favorable to the workers, "they should be violated" (p.87a, Jacobs, R.

(footnote continued on next page)

Because this is an impermissible burden in the area of First Amendment rights which are especially in need of judicial protection, and is in conflict with the principles established by the decisions of this Court, the petition should be granted.

(footnote continued from previous page)
13). This remark, which in any case would be protected as First Amendment expression, was immediately clarified in the following exchange with the Judge (which the Board fails to note):

"Q. What if anything does an organizer do other than express this view to the members of the union?
A. Fight within the structure of the law."
(Jacobs, R.14)(emphasis added).

The Board cites the Union's expression of belief that the Jacobs case was fabricated as another factor necessitating the broad order. (p.87a) Is the Board acting legally to attempt to silence these unfavorable comments by an all-encompassing injunctive decree?

VII

THE PETITION RAISES FOR REVIEW AN IMPORTANT QUESTION OF FEDERAL LAW NOT HERETOFORE DECIDED BY THIS COURT, AS TO WHICH THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS, NAMELY, WHETHER THE USE OF EXTRAORDINARY MAILING AND PUBLICATION REQUIREMENTS IN A REMEDIAL ORDER OF THE BOARD, WHICH GO MUCH BEYOND THE BOUNDS NECESSARY TO REMEDY THE UNFAIR LABOR PRACTICES, IS A PUNISHMENT PROHIBITED BY THE ACT.

The requirement that notices be posted as part of a remedial order has a definite position in the scheme of remedies under the Act. A notice serves the purpose of informing the employees affected that their rights will no longer be infringed upon by the illegal practices and that if the practices continue, further action will be taken.

However, enforcement of such provision is not automatic. Where the extent of the order is greater than necessary to protect the interests of the employer or the employees, the Court may not enforce that provision. Smith Steel Workers v. A.O. Smith Corp., 420 F.2d 1, 10 (7 Cir. 1969). News Printing Company v. NLRB, 231 F.2d 767, 772 (D.C. Cir. 1956). And where an affirmative order goes beyond the bounds necessary to remedy the practices, it will be found to be punitive. NLRB v. Douglas & Lomason Co., 443 F.2d 291 (8 Cir. 1971). Decaturville Sportswear v. NLRB, 406 F.2d 886, 888 (6 Cir. 1969); NLRB v. Food Fair Stores, 307 F.2d 3 (3 Cir. 1967).

Thus, when the Board imposes extraordinary notification requirements, it must also make specific findings to show that more than the normal posting is required. In J.P. Stevens & Co. v. NLRB, 380 F.2d 292 (2 Cir. 1968) the Court affirmed the Board's mailing requirement

specifically because one of the unfair labor practices committed by that company involved mailing an illegal notice to all the employees. The Court reasoned that the Board's notice was entitled to the same circulation. Supra at 304. The Court concluded that "such a mailing order is /not/ necessary or even desirable in most cases." Id.

The Board does not point to any special circumstances which might necessitate the extraordinary remedies imposed in this case. Nor can the use of the boiler plate words, "to better effectuate the policies of the Act and serve the public interest" (pp.25a, 64a n.8, 94a n.3, 133a n.7) justify the Board's use of any extraordinary remedy it may choose without finding that it is particularly suited to remedy the practice found.

The Board does not suggest that the 22 employees in Jacobs, the 11 in Macal or the 139 in Carborundum will not be reached by the normal methods of notification. Nor does the Board explain why the normal posting at Catalytic would serve to inform the employees when done by petitioner Comité Organizador Obreros en Huelga de Catalytic but not when done by petitioner Unión Nacional de Trabajadores. Thus, the Board has failed in its burden to show a need for extraordinary action.

The punitive impact can be most clearly seen in the publication requirement. The Union is ordered to publish the prescribed notices in all newspapers of general circulation in Puerto Rico. The obvious purpose of this provision is not to reach and inform the affected employees, but to taint the Union in the eyes of every one of the several million inhabitants of Puerto Rico. 38/

38/ There was no evidence that the strikes or

(footnote continued on next page)

Cf. NLRB v. Douglas & Lomason Co., supra at 295.

There is no doubt that the widespread publication of the notices could seriously damage the Union's standing and association in the community, which are the lifeblood of any labor organization. Posting is a stigma, an official branding. Wisconsin v. Constantineau, 400 US 433 (1971). Where posting does not have a legitimate remedial purpose supported by appropriate findings, it is not within the statutory authority of the Board.

This is not to say that the Board may not use publication in an appropriate case. For example, where the unfair labor practices involve discrimination in hiring, there may be no other way to reach the actual and potential discriminatees except through use of the mass media. See, e.g., Local 420, Plumbers, 111 NLRB 1126 (1955)(only one newspaper).

Because the First Circuit's decision on this point was not made on the basis that the Board had found evidence of the particular need to use extraordinary remedial notification provisions, it is in conflict with decisions of other Courts of Appeals, notably, the Eighth Circuit's opinion in NLRB v. Douglas & Lomason Co., supra, and the Second Circuit's in J.P. Stevens & Co. v. NLRB, supra, as well as applicable pronouncements of this Court. The petition should be granted to avoid confusion among the circuits and provide guidance for the Board's future action.

(footnote continued from previous page)
cases involved here received any coverage whatsoever in the Puerto Rican press. Even if they had, this is not an appropriate basis to require publication of the notices. Teamsters, Local 327, 178 NLRB 422, 429 (1969), Teamsters, Local 327, 201 NLRB 787, 792 (1973).

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgement and opinion of the Court below.

Dated: September 13, 1976

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APPENDIX

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. 151 et seq.

29 U.S.C. Section 151

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. Section 157

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

29 U.S.C. Section 158(a)(1)

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

29 U.S.C. Section 158(b)(1)(A)

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

29 U.S.C. Section 159

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the pur-

poses of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or

labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor orgnizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging the desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

"(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

29 U.S.C. Section 160(a)

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

29 U.S.C. Section 160(c)

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Rule 65, Federal Rules of Civil Procedure

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

UNION NACIONAL DE TRABAJADORES
AND ITS AGENT ARTURO GRANT

and Case No. 24-CB-888

MACAL CONTAINER CORPORATION

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[October 31, 1974]

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DECISION

Statement of the Case

EUGENE E. DIXON, Administrative Law Judge: Upon charges filed on April 24, 1974, by Macal Container Corporation alleging that Union Nacional de Trabajadores and its Agent Arturo Grant had engaged in and were engaging in unfair labor practices in violation of the National Labor Relations Act as amended (61 Stat. 136) herein called the Act, a representative of the General Counsel of the National Labor Relations Board, herein called the General Counsel and the Board, issued a complaint dated June 10, 1974, alleging violations by Respondent of Section 8(b)(1)(A) of the Act.

The complaint, as amended at the hearing, alleged in substance that the Respondent had engaged in various acts of intimidation and violence or threats of such and blocked the access of employees to the Company's plant. In its answer Respondent denied the commission of any unfair labor practices.

Pursuant to notice the matter was heard at Hato Rey, Puerto Rico, August 6 and 7, 1974, with all parties represented by counsel.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business Involved

The Employer is and has been at all times material herein a corporation duly organized under, and existing by virtue of, the laws of the Commonwealth of Puerto Rico. At all times material the Employer has maintained an office and place of business at Julio N. Matos Industrial Park, in the City of Carolina, Commonwealth of Puerto Rico, herein called the plant, where it is, and has been at all times material, engaged in the manufacture, sale and distribution of paper boxes and related products. During the past year, which is representative of its annual operations generally, the Employer, in the course and conduct of its business, purchased and caused to be transported and delivered to its plant, cardboard and other goods and materials valued in excess of $50,000, which were transported and delivered to its plant in interstate commerce directly from points located outside of Puerto Rico. The Employer is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Union Nacional de Trabajadores is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Manuel Calderon, President of Macal, testified that about noon on April 22, 1974, Union President Arturo Grant accompanied by two men[1] entered Respondent's plant and in the presence of about four employees asked Calderon for "the cards of the employees who had resigned" demanding that he "put them to work immediately." Calderon, surrounded by the three men, asked who Grant was and what he was doing there. Grant told Calderon that Calderon knew who he was and said "You son-of-a-bitch, put those people to work." Calderon said that they had resigned voluntarily and Grant pushed

[1] It was established that one of the two men accompanying Grant was Elias Castro who, although present at the hearing, did not testify.

him down on the steps leading to the office mezzanine. Calderon then shouted to his wife Lydia who was on the office mezzanine to lock herself in the office. Hearing this Grant again pushed Calderon and headed up the stairs.

On the mezzanine Grant called down to his two companions to bring Calderon up to the office. In the meantime Mrs. Calderon, becoming hysterical, pleaded with the two men to leave her husband alone because he "suffers from a heart condition and . . . could die." At this, one of the men laughed and said "F--- him, let him die." At this point Mrs. Calderon came down the stairs. One of the men told her "Get the hell out of here, the one we want is him." They also said that they were going to stay with Calderon and "were going to keep the factory."

Mrs. Calderon then left the plant and ". . . all of a sudden" Calderon "broke loose" and joined his wife outside who had gotten into their car with a company employee at the wheel. Calderon got in the car and he and his wife were driven away.

According to Calderon's further testimony, he returned to the plant that evening in the company of a friend, his lawyer and the doctor who had attended his wife who had been hospitalized that day as was Calderon the following day, both of whom were not released until September 30. At this point they found two policemen outside. When they went to unlock the plant they found the lock jammed with little pieces of wood and were forced to "wrench away the hasp" to gain entrance. Inside they discovered that the resignation card of one employee and some other unidentified cards and a keyholder with keys to the office and plant were missing.

Mrs. Calderon substantially corroborated her husband's testimony.

The only one to testify about the foregoing incident on behalf of Respondent was Arturo Grant. He testified that he and his two companions met Calderon as he was coming out of his office. Grant introduced himself

as President of the Union Nacional and stated that he was there on official business. Calderon replied that he had nothing to say to Grant or any union and referred Grant to his lawyer. Grant replied that his concern was to get recognition for the Union and to discuss the discharge that morning of seven employees. At this point, according to Grant, Calderon's wife "came out of the office and she came out quite nervous. She expressed herself as though somebody was going to jump on her and her husband and she also expressed herself that nothing should be done to her husband because he had a heart condition and nothing should be done to her because she was a cripple." At that moment they "all started downstairs, being that Mr. Calderon had indicated that (they all) could go to the offices of his lawyer." As to what happened at this point Grant testified as follows:

> After that Mrs. Calderon showed a very nervous state and Mr. Elias Castro spoke to Mr. Calderon and told him he thought that it would be best if he took his wife some place for her nervous condition. At that moment Mrs. Calderon called one of the employees so that he could take her to the hospital. Meanwhile we asked Mr. Calderon for the letters that he had made these employees sign as resignations, and one involved specifically Mr. Alberto – I do not remember the last name – Mr. Calderon told Mr. Alberto that if he did not sign that letter of resignation, that for the money he owed Mr. Calderon he would be taken to court, that he did not want any of his employees unionized, and in respect to each employee, something similar had occurred, and that is why we were insisting on discussing this problem.

After Mrs. Calderon went outside Calderon said, "Let me go out to my wife" which he did joining her in the car and leaving. After that Grant told Calderon's son, Roberto, to close the plant which Roberto did.[2] In his

testimony Grant denied speaking offensively or threateningly to Calderon or at any time touching him. He also denied saying that he was going to take over the plant.

In addition to my observation of the witnesses, the fact that Castro did not testify (although being present at the hearing), that for no apparent reason Mrs. Calderon, according to Respondent's testimony, became so upset as to prompt a suggestion by Castro that she have the attention of a doctor, I credit the General Counsel's version of the foregoing.

Nonetheless, in the absence of a showing that there was a strike in progress at Macal at this time[3] or other concerted activity of the employees upon which the Union's actions could have influence, I find that the above conduct of Respondent, however reprehensible or accountable under other laws, cannot be said to have coerced or interfered with the employees' rights within the meaning of Section 8(b)(1)(A) of the Act. Here there was no evidence of any kind of action being engaged in by the employees in which they could exercise their Section 7 right to join or refrain from and thus nothing that the Union's conduct could influence within the meaning of Section 8(b)(1)(A) of the Act. Cf. *Local 140, United Furniture Workers of America, CIO and Brooklyn Springs Corporation*, 113 NLRB 815; *International Woodworkers of America, AFL-CIO, et al. and W. T. Smith Lumber Company*, 116 NLRB 507.

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[2] Roberto Calderon apparently was estranged from his father and testified at the call of Respondent corroborating Grant's testimony that Roberto locked up the plant.

[3] The complaint alleged a strike commencing on or about April 23. No evidence was offered to support this allegation. The earliest that a strike was indicated came in the testimony of Assistant Manager Flores who related that on May 6 he waited at the plant about noon and that the employees had "shouted from outside that they were on strike and that they did not want to enter in to work."

Miguel A. Ortiz Martinez, an employee of Macal called by the General Counsel, testified that on arriving at the plant the early morning of May 28, he went across the street to get a coke from a portable canteen. While there he was approached by Union Agents Carmen Sampson and Elias Castro. About what transpired Ortiz testified:

> . . . the girl . . . opened up the coke and she approached me and she said to me, "I heard that you were going to buy the factory." I did not know what to tell her. So the bearded man (Castro) was already next to her, which they talked together from across the street to me. So I said to her, "I might buy the factory, I might buy it." So she says to me, "Do you know what you are going to get into it, do you know how to operate that factory?" I says to her, "Yes, I know." So then she says to me, "You had better think about it before you do any move," and I says to her, "Why?" Then she says to me, just to be careful, you might come out in a coffin if you do go in there."

By this time Arturo Grant also was present. Sampson went on to tell Ortiz that before going into the factory he might have to fight with Grant. Ortiz said it didn't bother him. Grant then said "Be careful, something might happen to you." Then Castro said, "Don't forget, sometimes you have to walk alone in the street." Ortiz then said, "All right." Castro said, "Okay, be careful."

According to Ortiz's further testimony Grant and his two union cohorts were not allowing employees to go into work. Ortiz was waiting for the supervisors to open up and let him in. The union trio told him he could not go in to work. Ortiz said he was going in. About 2 weeks previously, according to Ortiz's further testimony, Sampson and Castro had given him a union leaflet telling *inter alia* about "a professional strikebreaker" dying "upon

attempting to cross the picket line" of Respondent Union. They told him "Here, read this carefully." They also told him, "You have a nice truck[4] take care of it. . . ." Adding that it would not look nice if something happened to it. Ortiz told them nothing was going to happen to it. He was again warned not to do any work for Macal.

After Ortiz finished his testimony a short recess was taken. At the resumption of the hearing, the General Counsel asked for and was granted permission to recall Ortiz. At this time Ortiz testified that as he was walking in the corridor Grant said to him that "The street is lonely at night."

About the immediate foregoing Grant testified that Ortiz initiated the recess conversation speaking in a menacing tone, wanting to know if Grant knew Mr. Chu Castro, who wanted to talk to Grant. According to Grant he told Ortiz that he did know Chu Castro, that he was a friend and that he was willing to talk to him about "whatever he wanted." Grant further testified that he told Ortiz nothing else.

About the incident of May 28, Grant testified that when Ortiz said that he was "very interested" in buying Macal, Grant told Ortiz "It wasn't proper for him to get involved in Macal for the simple reason that there were problems there and there had been a petition filed with charges against Macal. Ortiz replied that he would get into whatever he chose and that nobody was going to "impose" anything on him. At this time Sampson and Castro were present. Apparently Castro made some remark to which, according to Grant, Ortiz replied as follows:

> Mr. Ortiz replied to Mr. Castro that he was the type of person who did not let anybody stop him in whatever he wanted to do and that he had the people as well as the power to do what he

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[4] Ortiz apparently maintained a trucking business in addition to his employment by Macal.

> wanted to do in Macal, and at the same time motioned towards his waist as if he either had a revolver or a pistol. To that, Mr. Castro replied that no one was going to work there unless they were the employees from Macal, and in reply to that he stated that he had his own employees to work in Macal and that no one who had worked for Mr. Calderon was going to work for him. It is the first word that I have had that Mr. Ortiz was employed by Macal as a machine I don't know what, because all the time he was going around letting it be known that he was the owner of Macal and that he was going to do as he pleased.

Grant also testified that he did not believe that Sampson said anything. Asked by his counsel if anyone had told Ortiz that if he went into the plant to work he would be taken out in a coffin, Grant made a rambling reply that did not answer the question.

Jose Ramon Malabet, an employee first hired by Macal on May 24, 1974, was called by the General Counsel and testified that prior to starting time at the plant on the morning of May 28, a group of about eight people among whom was Grant approached him and a few other sitting under a van waiting to go to work. Grant told them to leave the premises because there was a strike – that "This is Union Nacional and we are not responsible for what will happen to you." Malabet said he was told to come to work. Grant said "Get the hell out of here" in such a manner that Malabet and the others were frightened and left to go to a gas station nearby. Just prior to this someone apparently called to Malabet from the plant. Malabet was about to answer when Grant put his hand on Malabet's chest saying, "Don't try to get in there, we already told you you can't go in there."

Grant followed Malabet and his companions to the gas station. There Malabet approached Grant and explained he had been sent for and could not

leave until he talked to Flores, the assistant manager. Grant said if employees went in "they would blow the top of (their) heads off." Nonetheless Macal went back to the plant and told Willy (unidentified) "that the boys did not want to work" and were leaving. At this point he was again accosted by Grant (by himself now) who told him "You son-of-a-bitch didn't we tell you you couldn't go in there." Malabet told him "I was told to come to work . . . don't come and get wise because you are alone now." Grant's reply was "This is Union Nacional and we kill people. So leave." At this point some policemen came out and Malabet left.

From his cross-examination it appears that policemen were in the area at all times but that Malabet made no complaint to them.

According to Grant he and the union people asked Malabet and his companions if they were employed by Macal. Learning that they were Grant asked if they were aware of the conflict that was going on between Macal and Union Nacional – what the problem was. Macal said he didn't and the conversation continued for about 15 or 20 minutes in a conversational tone with the policemen in the immediate area.

As to the foregoing matters Union Organizer Carmen Sampson testified that in the company of Union Representatives Castro and Grant she arrived at the Macal plant early in the morning on April 28.[5] There they found about four people waiting inside the plant gate to go to work. She and her two companions walked on to the premises to talk to the waiting employees. A policeman (who explained "that he was there to protect the people that were there") accompanied them and "stayed by the side of Arturo Grant" while he addressed the employees. After Grant's explanation that there was

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[5] She later testified that it was either April or May 28. Then insisted that it was April 28 explaining that she knew because that was the date of her "anniversary." It is clear that she is talking about the May 28 incident.

a strike going on at the plant the waiting employees "voluntarily walked out" and joined the strike.

Sampson further testified that on the same occasion Ortiz arrived at the scene "in a very arrogant manner, provoking manner." As to what took place with Ortiz, Sampson testified as follows:

> He stated that he was going to buy the plant and that he was going to do as he saw fit and Elias Castro told him that he could not and he explained to him the problem, the conflict that we had at the plant and that we were representing the workers. Mr. Ortiz told Elias Castro that he had better be careful because he had a cannon (sic) or a gun and he showed him by putting his hand towards his waist and he said that he was willing to blow the top of anybody's head and before the day was over, two or three would fall.

Sampson also testified that Ortiz's "manner was so arrogant that Elias Castro felt very uncomfortable and they almost came to blows." At no time did Sampson deny telling Ortiz that if he went into the plant he might come out in a coffin.

Conclusions

As to the Ortiz matter, while Ortiz may have demonstrated some defiance toward the union representatives I am inclined to credit Ortiz in general and find that Respondent Union through its representatives threatened him with death on May 28, 1974, if he went to work for the charging party: I also find that a similar threat had been implied about 2 weeks earlier in the leaflet Ortiz was asked to carefully read. Additional harm or damage was threatened on May 28 in connection with Ortiz's truck and was also implied in the remark made to him by Grant during a recess at the hearing.

I also believe and find that regardless what pacific means Grant and company may have used to persuade Malabet and the other employees to join in

a strike against Macal, the Union also indulged in threats and intimidation exceeding the bounds of propriety in achieving their objective of preventing the employees from going to work. By the foregoing conduct Respondent violated Section 8(b)(1)(A).

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Union set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Union Nacional de Trabajadores is a labor organization within the meaning of Section 2(5) of the Act and Arturo Grant is, and at all times material has been its agent within the meaning of Section 2(13) of the Act.

2. Macal Container Corporation is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and business activities affecting commerce within the meaning of Section 2(7) of the Act.

3. By restraining and coercing employees of Macal as found herein, Respondents have committed and are committing unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

The Remedy

Having found that Respondents have engaged in certain unfair labor practices I shall recommend an order that they cease and desist therefrom and take certain affirmative action as specified below, which is necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

The Charging Party has referred to several previous cases involving this Union as a Respondent and asks for a much more extensive remedy than to date has been generally approved by the Board. Thus, in addition to a broad order it requests: 1) that the Union be required to mail individual notices in understandable language to each of its employee members throughout Puerto Rico; 2) reimbursement by the Union of all attorneys fees and all costs of litigation both to the Charging Party and the Board; and 3) back wages to those employees who were prevented from working as a result of Respondents' conduct. The only one of these requests joined in by General Counsel was the request for a broad order.

Similar extensive requests were made and treated at length in two recently issued Administrative Law Judge decisions.[6] I shall restrict the scope of my recommendations to a broad order as requested by the General Counsel and defer to the Board consideration of the remedy matter in the light of all three cases.

Upon the foregoing findings of Fact, conclusions of law and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

ORDER

Union Nacional de Trabajadores and its Agent Arturo Grant shall:

1. Cease and desist from:

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[6] *Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga Catalytic*, Cases 24-CC-168 and 24-CB-877 issued by Administrative Law Judge Goldberg on September 30, 1974; and *Union Nacional de Trabajadores and its agent, Alcides Serrano*, Case No. 24-CB-885 issued by Administrative Law Judge Klein on September 26, 1974.

[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Restraining or coercing employees of Macal Container Corporation by assaulting them or threatening assault or other damage for the purpose of preventing them from working for Macal or any other employer.

(b) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its offices and meeting places in Puerto Rico copies of the notice attached hereto and marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for Region 24, shall, after being duly signed by Arturo Grant and an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Forward signed copies of said notice to the Regional Director for posting by Macal, it being willing, at all locations where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C., October 31, 1974.

/s/ Eugene E. Dixon
Eugene E. Dixon
Administrative Law Judge

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[8] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO
EMPLOYEES AND MEMBERS
Posted by Order of the
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT assault employees of Macal Container Corporation or threaten them with assault or other damage for the purpose of preventing them from working for Macal or any other employer.

WE WILL NOT restrain or coerce employees in any other manner in the exercise of the rights guaranteed them in the National Labor Relations Act, as amended, except as a condition of employment as provided in Section 8(a)(3) of the Act.

UNION NACIONAL DE TRABAJADORES
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

Dated _____ By _____
Arturo Grant Agent

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan Am Building – 7th Floor, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00917 Telephone 622-0247.

[July 23, 1975]

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DECISION AND ORDER

On October 31, 1974, Administrative Law Judge Eugene E. Dixon issued the attached Decision in this proceeding. Thereafter, Respondents and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed exceptions.[1]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge as modified herein.

We find merit in the exceptions taken by the General Counsel and Charging Party to the Administrative Law Judge's failure to find that Respondents violated Section 8(b)(1)(A) by violently assaulting the president of the Charging Party in the presence of the Charging Party. The assault occurred in the course of an attempt by Respondents to force the Charging Party to reinstate some employees whose terminations were a matter of dispute. That Respondents would resort to such tactics in enforcing their demands would, in the circumstances of this case, tend to have a coercive effect upon employees regarding their own exercise of rights guaranteed by the Act. The fact that there was no evidence of a strike being conducted on the date the assault occurred

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[1] Respondents' request for oral argument is hereby denied as the record and briefs adequately present the issues and positions of the parties.

[2] The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

does not in itself negate the potential coercive effect on interested employees.[3] We therefore find that Respondents further violated Section 8(b)(1)(A) by virtue of their assault on Mr. Calderon.

We also find, however, that one of the incidents of 8(b)(1)(A) violation found by the Administrative Law Judge is not supported by the evidence. The Administrative Law Judge found that on two separate occasions Miguel A. Ortiz-Martinez was threatened by Respondents in violation of Section 8(b)(1)(A). One of these occasions was on May 28, 1974, and the other was approximately 2 weeks earlier. Ortiz testified that he was employed by the Charging Party on May 27, 1974. Since the earlier incident occurred at a time when there is no evidence that Ortiz was an employee, the occurrence he described in his testimony is insufficient to constitute restraint or coercion of employees within the meaning of Section 8(b)(1)(A).

Finally, we agree with the Administrative Law Judge that Respondents impliedly threatened Ortiz during a recess at the hearing in the instant proceeding when, after Ortiz had completed his testimony regarding earlier incidents of alleged coercion, Respondent Grant said to him, "The street is lonely at night." We think this implied threat was directed at Ortiz' giving of testimony in support of the complaint herein and was for that reason violative of Section 8(b)(1)(A).[4]

The Remedy

As we have found that the midhearing threat to Ortiz was a violation of Section 8(b)(1)(A) for a different reason than the other violations already found,

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[3] Contrary to the Administrative Law Judge, we read the uncontroverted testimony of witness Ortiz as evidence that employees of the Charging Party were on strike on April 23, 1974, the day after this incident.

[4] *International Brotherhood of Electrical Workers, Local Union No. 34, AFL-CIO (Protection Alarms, Inc.)*, 208 NLRB No. 91 (1974).

and as we have found an additional violation of Section 8(b)(1)(A) in the assault on Calderon, we shall modify the recommended Order accordingly.[5]

As we find that Respondents' conduct herein is similar to conduct violative of Section 8(b)(1)(A) as found in the cases of *Union Nacional de Trabajadores and Its Agent, Alcides Serrano (Jacobs Constructors Company of Puerto Rico)*, 219 NLRB No. 65, and *Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga de Catalytic (Catalytic Industrial Maintenance Co., Inc.)*, 219 NLRB No. 66, both issued on this date, we shall expand the scope of the Order to enjoin the restraining or coercing of employees of the Charging Party or of any other employer in Puerto Rico, and to require extraordinary measures concerning the publication and distribution of the usual notice, so as to better effectuate the policies of the Act and serve the public interest.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Union Nacional de Trabajadores, Rio Piedras, Puerto Rico, its officers, agents and representatives, and Respondent Arturo Grant while acting as agent of Respondent Union Nacional de Trabajadores, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Macal Container Corporation or of any other employer in Puerto Rico by assaulting or threatening assault or other damage to employees, to representatives of employers, or to anyone else for the purpose of preventing employees from working for Macal or any other employer, or preventing employees from testifying fully and truthfully at a hearing conducted by the National Labor Relations Board.

(b) In any other manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

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[5] The finding of a violation by the Administrative Law Judge which we have reversed, because Ortiz was not an employee at the time, was similar to other violations we have found. Therefore the reversal does not affect the remedy provided herein.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Post at its offices and meeting places in Puerto Rico copies of the attached notice marked "Appendix."[6] Copies of said notice, in English and in Spanish, to be furnished by the Regional Director for Region 24, after being duly signed by Arturo Grant and an authorized representative of the Respondent Union, shall be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forthwith mail copies of said notice, in English and in Spanish, to the said Regional Director, after said copies have been signed as provided above, for mailing of said notice by the Regional Director to each employee in Puerto Rico of Macal Corporation, and to Macal Container Corporation, for posting by it, if willing, at its premises at any location in Puerto Rico in places where notices to employees are customarily posted.

(c) Publish said notice, at Respondent Union's expense, in all newspapers of general distribution published in Puerto Rico, and in any newspaper of Respondent Union, in each case in the language in which the newspaper is printed.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C., July 23, 1975.

Betty Southard Murphy,	Chairman
John H. Fanning,	Member
Howard Jenkins, Jr.,	Member
John A. Penello,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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MEMBER KENNEDY, dissenting in part:

For the reasons fully stated in my dissenting opinion in *Catalytic Industrial Maintenance Co., Inc.*, 219 NLRB No. 66, issued this date, I dissent from my colleagues' refusal to award backpay to those employees who were prevented from working by Respondents' unlawful restraint and coercion.

As in *Catalytic* and *Jacobs Constructors Company of Puerto Rico*, 219 NLRB No. 65, also issued this date, agents of Respondent Nacional, particularly Respondent Arturo Grant, its president, threatened employees and company officials with physical harm if they attempted to undermine the strike effort.

In addition, according to the credited testimony, Grant pushed Macal President Calderon down a flight of stairs, requiring his hospitalization for approximately 5 months. Miguel A. Ortiz-Martinez testified that three union officials – Grant, Castro-Ramos, and Sampson – "were not allowing employees to go into work." Ortiz-Martinez himself was warned by Sampson that "you might come out in a coffin if you go in there."

Jose Ramon-Malabet testified that he "and a few others" were approached at the plant gate by approximately seven union agents, including Grant, and were told, "This is Union Nacional and we are not responsible for what will

happen to you . . . . Get the hell out of here." Grant subsequently placed his hand over Malabet's mouth and, with reference to the plant, warned, "Don't try to get in there, we already told you you can't go in there." Finally, Grant stated that, if the employees went inside, "they [Respondent Nacional's agents] would blow the top of their heads off. This is Union Nacional and we kill people. So leave."

On the basis of this credited testimony and for the reasons stated in my *Catalytic* dissent, *supra*, I would award backpay for wages lost on account of Respondents' unlawful conduct.

Dated, Washington, D.C., July 23, 1975.

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

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APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT assault anyone or threaten anyone with assault or other damage for the purpose of preventing employees of Macal Container Corporation or of any other employer in Puerto Rico from working for Macal or any other employer, or preventing them from testifying fully and truthfully at a hearing conducted by the National Labor Relations Board.

WE WILL NOT restrain or coerce employees in any other manner in the exercise of the rights guaranteed them in the National Labor Relations Act, as amended, except as a condition of employment as provided in Section 8(a)(3) of the Act.

UNION NACIONAL DE TRABAJADORES
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

Dated _____ By _____
(Arturo Grant) (Agent)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan Am Building, 7th Floor, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00917, Telephone 809-622-0247.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

UNION NACIONAL DE TRABAJADORES AND
ITS AGENT ARTURO GRANT

and Case No. 24-CB-907

THE CARBORUNDUM COMPANY OF
PUERTO RICO AND CARBORUNDUM
CARIBBEAN, INC.

THE CARBORUNDUM COMPANY OF
PUERTO RICO AND CARBORUNDUM
CARIBBEAN, INC.

and Case No. 24-CA-3548

UNION NACIONAL DE TRABAJADORES
February 13, 1975

. . . . . .

DECISION

Statement of the Case

ARNOLD ORDMAN, Administrative Law Judge: In September and October of 1974 the employing enterprises and the Union, each named in the caption, herein identified, respectively, as the Employer and the Union or as Respondent Employer and Respondent Union, filed charges of unfair labor practice against each other. Pursuant to these charges, complaint issued against the Union and its agent Arturo Grant on October 15, 1974 (Case No. 24-CB-907), and complaint issued against the Employer on October 23, 1974 (Case No. 24-CA-3548). By order, also dated October 23, 1974, the two matters were consolidated for hearing.

The principal issue posed in Case No. 24-CB-907 is whether the Union and Grant, by violence and threats of violence, restrained and coerced employees in the exercise of their rights under Section 7 of the National Labor

(Footnote omitted in printing.)

Relations Act, as amended, thereby violating Section 8(b)(1)(A) of the Act. The Union and Grant deny the commission of unfair labor practices. The principal issue posed in Case No. 24-CA-3548 is whether the Employer refused to meet and bargain with the Union which had been certified as the bargaining representative of its employees in an appropriate bargaining unit, thereby violating Section 8(a)(5) of the Act. The Employer denies the commission of unfair labor practices, and urges affirmatively that because of events following the certification of the Union, it is no longer under any obligation to meet and bargain with the Union.

Hearing on the controverted issues was conducted before me in Hato Rey, Puerto Rico on November 7 and 8, 1974. Oral argument was presented at the hearing and subsequently, on December 30, 1974, written briefs were received from all parties.

Upon the entire record in this proceeding, upon my observation of the witnesses and after due consideration of argument and briefs, I make the following:

Findings and Conclusions

I. Jurisdiction

The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., herein collectively referred to as the Employer, are Puerto Rico corporations and, at all times material here, have been a single integrated corporation engaged in the manufacture, sale and distribution of abrasives, ceramics and related products. The Employer's principal office and plant is in the city of Mayaguez, Puerto Rico. During the past year, a representative period, the Employer, in the course and conduct of its business has purchased and received at its Mayaguez plant goods valued in excess of $50,000 from points outside Puerto Rico.

Union Nacional de Trabajadores, herein the Union, was certified, on May

22, 1974 as the exclusive representative of the Employer's production and maintenance employees in an appropriate unit.

Upon the foregoing undisputed facts General Counsel alleges, the Employer and the Union admit, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. It is further admitted, and I find, that Arturo Grant, named as a Respondent herein, Osvaldo Romero, Carlos Rodriguez and Carlos Gomez are, and have been at all times material herein, respectively, the president, secretary of organization, organizer, and organizer of the Union, acting on its behalf, and agents thereof within the meaning of Section 2(13) of the Act.

I conclude and find that it is proper for the Board to assert jurisdiction in this proceeding.

II. The Unfair Labor Practices

A. Background

Following an election proceeding before the Board participated in both by the Union herein and by an independent union of the Employer's employees, here called the Independent, the Union was certified on May 22, 1974, as the exclusive bargaining representative of the production and maintenance employees of the Employer. Thereafter, the Employer and the Union held a number of bargaining sessions for the purpose of negotiating a collective-bargaining agreement covering the employees in the unit for which the Union had been certified as bargaining representative. The last such meeting was held on August 22, 1974 at the Mayaguez Hilton Hotel in Mayaguez, Puerto Rico, the location of the previous meetings. No agreement resulted. Arrangements were made for a further meeting to be held on September 18, 1974 in San Juan at the Department of Labor offices with a conciliator from the Department of Labor present. The Department of Labor conciliator appeared as did

representatives for the Union. No representatives for the Employer appeared.

The parties stipulated that following this abortive effort, the Union made several requests for further bargaining with the Employer and the Employer received these requests. However, no further bargaining occurred.

The instant cases arise out of the foregoing situation. The Employer takes the position, *inter alia*, that because of acts of violence, threats and intimidation committed by the Union during the period in question, it was relieved of its obligation to bargain. In this connection, the Employer filed the unfair labor practice charges leading to the issuance of the complaint against the Union alleging that the Union had by such conduct violated Section 8(b)(1)(A) of the Act. The Employer, on September 20, 1974, also filed a petition to revoke the certification of the Union. The Regional Director for the Twenty-fourth Region denied the petition and the Employer requested the Board to review that denial. On November 5, 1974, the Board rejected this request without prejudice to renewal of the request before the Administrative Law Judge in the instant proceeding. Accordingly, Respondent has moved in the instant proceeding for revocation of the certification.

The Union for its part filed unfair labor charges against the Employer resulting in the issuance of a complaint alleging that the Employer, by refusing since on or about September 19, 1974, to meet and bargain with the Union as the exclusive bargaining representative of the Employer's employees in an appropriate unit, violated Section 8(a)(5) of the Act.

The evidence and subsidiary findings relevant to the respective cases, consolidated for purposes of this proceeding, are set forth hereunder.

B. Case No. 24-CB-907

The specific derelictions alleged in the complaint against the Union recite that on or about August 22, 1974, Arturo Grant, during the course of a negotiating meeting, threatened to slap representatives of the Employer's negoti-

ating committee;[2] that on or about September 17, 1974, Grant and other agents of the Union threatened to inflict and did inflict bodily injury upon an employee and upon a supervisor of the Employer; that on the same date Grant threatened to kill said employee; and that on or about September 19, 1974, Grant in the presence of employees threatened to knock down the gates to the Employer's plant. These incidents are discussed hereunder *seriatim*.

(1) The incident of August 22: As noted, the last negotiating meeting between the Employer and the Union occurred on August 22, 1974. Four officials appeared, Grant and Romero, accompanied by four employees comprising the employee committee. Of these ten individuals only four testified: Richard Tremble, the Employer's labor relations representative; Jose Remus, plant manager of the Employer's pouring plant; Arturo Grant, president of the Union; and Osvaldo Romero, organizing secretary for the Union. Only two of these four, Remus and Grant, testified as to the "slapping" incident.

It appears that at the August 22 meeting, the Employer's representatives submitted their final contract proposal to the Union with the suggestion that the proposal be submitted to the union membership for approval. Grant replied that the proposal was unsatisfactory and that it would be submitted to the membership with a negative recommendation. Grant also added the comment addressed to Tremble that this is a bunch of "desgraciados" and stated also that this was a "cabronada" on the part of the Employer.[3]

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[2] This allegation was made pursuant to General Counsel's motion, made at the opening of the hearing. Notice of the motion had been given to the parties well in advance of the hearing and no objection was made to the motion. The motion was granted.

[3] The bargaining negotiations were conducted essentially in Spanish. So, too, was the hearing herein, necessitating the use of an interpreter. The parties were unable to agree as to an accurate translation of the words "desgraciados" and "cabronada." The word "desgraciados" was translated, albeit inadequately, as "scoundrels" or "miserable people," but no agreement could be reached as to whether the term was essentially an insult. There was agreement that the word "cabronada" was an offensive term but not even an approximate translation could be stipulated.

Thereupon, according to Remus, who appeared as a witness for General Counsel, Grant announced that it was better to conclude the meeting because "I'm at the point of starting a fight." Remus further testified that Tremble and Padilla, the Employer's personnel manager, were talking to one another at this time when an employee member of the union negotiating committee started to address a remark to Padilla. At that point, Remus testified, Grant looked at the employee and said, "You keep quiet because I'm about to start slapping people here." Thereupon, according to Remus, Remus suggested that the Employer negotiators leave because things were getting bad, and the Employer negotiators did leave. On cross-examination by union counsel, Remus reaffirmed that Grant's remark about slapping people was addressed to the employee representative and not to the Employer's representatives. Remus could not remember any of the Employer negotiators making a statement that they were leaving the meeting because they were being mistreated.

Auturo Grant, also a witness for General Counsel, gave the only other competent testimony relevant to the "slapping" incident. In reply to a question by counsel for the Union, Grant denied that he had threatened at the August 22 meeting or at any other time to slap members of the Employer's negotiating committee.

As noted, the amended complaint alleges that Grant threatened at the August 22 meeting to slap the "Employer's representatives." That allegation is not specifically supported by the record, Grant denied having made the statement at all. What was established, however, by Remus' testimony, which I credit, is that toward the close of the August 22 meeting, in the presence and hearing of both the Employer's representatives and the employee representatives of the Union, Grant did address the remark to one of the employee representatives that "You keep quiet because I am about to start slapping people here." I so find. I find further, as also established by Remus' credited testimony that Grant stated just a few moments before that it was better

to conclude the meeting because he was at the point of starting a fight. I discredit Grant's denials in this respect.

(2) The incidents of September 17: The relevant allegations of the complaint here are that Arturo Grant and other named agents of the Union threatened to inflict and did inflict bodily injury upon an employee, and upon a supervisor in the presence of that employee, and, further, that Grant threatened to kill said employee.

The principal support for these allegations derives from the testimony of Ortiz Cano and of Jenaro Rosario, the supervisor and employee involved.

Ortiz Cano, who had been a supervisor for Respondent for almost 20 years, testified that he came to Respondent's plant on September 17 at 6:20 a.m., 10 minutes before working hours started, as was his custom. When the starting bell rang, Ortiz Cano followed his usual practice of collecting the timecards of the employees he supervised. As he completed this task he saw Arturo Grant, Osvaldo Romero, Carlos Rodriguez and Carlos Gomez (all admittedly officers and agents of the Union) standing there together with an employee, Jenaro Rosario. Ortiz Cano further testified that, pursuant to longstanding directives of the Employer, he informed the four union officials that unless they had permission they could not go inside the plant. When no response was made, Ortiz Cano opened the door to the adjoining production control room where he did his work. At this point, according to Ortiz, he was shoved through the door by someone he did not see. Thereupon, Rodriguez asked him what he was going to do and Ortiz replied that he was going to bring the cards up to date. Ortiz testified that Rodriguez then hit him with his fist, that Grant, Romero and Gomez, who came into the room with Rodriguez, also struck him and beat him to the floor. Ortiz stated that when he looked up from the floor he saw the four union officials heading toward Jenaro Rosario, who was also present, and that Rodriguez had his hands up

in a menacing manner. According to Ortiz, he seized this opportunity to run out of the rear door to the office, escaping an effort by Rodriguez to grab him as he ran out.

Ortiz gave the foregoing testimony on direct examination by General Counsel. On cross-examination by union counsel, it appeared that Ortiz, an older man, was either reluctant to reply to questions or that his memory was not too sharp as to numerous matters. However, his account of the attack upon him remained unshaken despite vigorous questioning. The only additional information furnished by Ortiz as to this incident was that upon emerging from the office he told some employees, who were there, that he had been hit and that when Jose Remus, a plant manager, came into the plant at 7 a.m., Ortiz told Remus what had happened.

Employee Jenaro Rosario, a machine operator, testified next. He stated that he, also, came to the plant at 6:20 a.m. on September 17. Upon his arrival, according to Rosario, he saw the four union officials, previously named, standing in the area where Rosario punched in his timecard. As Rosario proceeded to enter the working area, Romero hailed him and asked whether he had been collecting signatures for a union deauthorization petition. Rosario gave Romero a noncommittal answer.[4] Romero sought to question Rosario further. At that point, Rosario testified, Ortiz, who was collecting his timecards, told the union officials they could not be present because they were not authorized. According to Rosario, Ortiz then proceeded to enter the production control room, Rodriguez shoved Ortiz inside the room, and all four union officials went into the room as did Rosario. Rosario corroborated Ortiz' account of the beating given Ortiz, corroborated that, as Ortiz

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[4] It is undisputed that Rosario had acted as an organizer for the Independent during the earlier election campaign which culminated in the certification of the Union.

fell to the floor, the union officials advanced toward Rosario and that Ortiz fled through the rear door at this juncture. Rosario testified that Rodriguez slapped him while the other union officials held him, Rosario, against the wall. The union officials then left the room, according to Rosario, but as Grant and Rodriguez walked out the door, they made the comment, "This one we are about to kill." Rosario testified that a report was made to the police as to what had occurred and a "warrant was sworn against them."

On cross-examination by counsel for the Union, Rosario stated that he made no effort to defend Ortiz because "there were four against two," and that he did not yell for help. Despite rigorous questioning, however, Rosario's account of the fracas remained essentially unshaken.

Of the four union officials involved in the September 17 incidents only Grant and Romero testified. Grant testified that he came to the plant that day at about 6:25 a.m. accompanied by Romero, Rodriguez and Gomez. Grant acknowledged speaking to the guard at the outside gate of the plant. Initially, Grant denied that the guard informed him he could not enter the plant premises until 8 a.m. when the office personnel arrived, but soon affirmed that the guard had so informed him. However, notwithstanding this admonition, Grant testified, he and his companions went in anyway, informing the guard that they were going in only for a few minutes to remind the employee members of the union negotiating committee of the bargaining session scheduled for the following day at the Department of Labor and to offer them transportation if needed. After entering the premises, according to Grant, the message was transmitted to the negotiating committee members. Grant also acknowledged that his colleague Romero spoke to Rosario on this occasion. Grant stated further that he and Rodriguez had followed a supervisor into an office and Rodriguez had grabbed the supervisor by the arm and asked the latter what he was going to do. Grant conceded that all four

union officials as well as Rosario were present in the office at the time but that he, Grant, remained at the door and that the total time spent in the office was from 30 seconds to a minute.

On cross-examination by counsel for the Union, Grant repeated that Rodriguez had grabbed a supervisor, now identified as Ortiz, by the arm. Grant explained the incident on the basis that Ortiz had stated they (the union officials) "could not be there," and that Rodriguez told Ortiz why they were there and that they were leaving. According to Grant, Ortiz said, "Now, you are going to see," and turned to enter an office whereupon Rodriguez grabbed Ortiz and asked, "What's happening? What are you going to do?" Grant testified that as he entered the office he saw Rosario there sticking his hand into his pocket. Grant testified further that he told Rosario to be careful what he was going to do because Grant thought Rosario was reaching for a gun.

Rodriguez, obviously a pivotal figure in these events, was not called upon to testify. Neither was Gomez. However, Romero, union secretary, was called as a witness for the Union. Romero testified on direct examination that he arrived at the plant between 6 and 6:30 a.m., that he was accompanied by Grant and Rodriguez, and that the purpose of the visit was to talk to the employees about ongoing negotiations. Romero confirmed that he questioned Rosario as to whether the latter had been collecting signatures to a petition adverse to the Union. He stated also that he was accompanying Rosario to the timecard rack when the bell for starting work sounded and that a gentleman, heretofore identified as Ortiz, informed the union representatives that they could not remain there. Romero testified that he told Ortiz he was talking to Rosario, that Ortiz announced that "if you don't leave, you will see," and ran into an adjoining office. Romero testified further that he followed Ortiz to calm him down and assure him nothing was happening and that Rodriguez who had been standing near the door also sought to calm

Ortiz. According to Romero, Rodriguez did nothing more except that Rosario entered the room and Grant took a position at the door. At that point, Romero testified, Grant addressed Rosario, who was reaching into his back pocket, and asked Rosario what the latter was going to do. According to Romero, he, like Grant, assumed Rosario was reaching for a gun. Romero concluded this phase of his testimony by stating that nothing more happened and that the union representatives left.

On cross-examination by General Counsel, Romero testified, contrary to Grant, that the guard made no effort to stop the union officials at the gate on the morning of September 17. However, in an earlier affidavit furnished to the Board, the witness had corroborated Grant's testimony in that regard. Romero also acknowledged in answer to questions propounded by counsel for the Employer that Rodriguez was holding Ortiz as Rodriguez, according to Romero, was trying to calm Ortiz.

The summary of the relevant evidence here presented as to the events of September 17 poses a substantial problem of credibility. I find that the testimony of Ortiz and Rosario is essentially straightforward, credible and consistent. To a considerable degree the testimony of Grant and Romero is corroborative but not as to the critical physical encounters and the threat to kill Rosario. On the other hand, the hostility of the union officials to Rosario, who had acted as organizer for the independent, is manifest on the record. Similarly, the union officials were obviously put out by Ortiz' statement that they had no right to be on plant premises without permission. The explanations proffered by Grant and Romero as to why they would follow Ortiz into the production control room impress me as being lame and somewhat contrived especially in view of their claim that they had really completed what they came to do at the plant, i.e., talk to the employee members of the union negotiating committee. Relevant here also is the fact that other conduct of the

union officials such as their disregard of plant guard instructions and, as more fully discussed hereunder, an asserted willingness to resort to physical force to achieve their objectives, displays a strong likelihood that they would engage in the type of physical attack and threat attributed to them by Rosario and by Ortiz, the latter of whom, so far as the record shows, played no partisan role in the antecedent and current Union Employer controversy. Significant here also is the unexplained failure of the Union to produce Rodriguez as a witness inasmuch as he was centrally involved in the events relevant here.

In sum, I credit the testimony of Ortiz and Rosario as to the events of September 17, 1974. Accordingly, I conclude and find that Arturo Grant, Rodriguez, Romero, and Gomez inflicted bodily injury upon Supervisor Ortiz in the presence of employee Rosario, inflicted bodily injury upon Rosario also, and that Grant and Rodriguez further threatened to kill Rosario.

3. The incident of September 19: The relevant allegation of the complaint here is that on or about September 19, 1974, at the Employer's plant, the Union's agent Arturo Grant, in the presence of employees, threatened to damage the Employer's property by stating that he would knock down the gates to the Employer's plants. The pertinent evidence can be succinctly stated.

Shortly before noon on September 19, Arturo Grant, accompanied by Rodriguez, Romero and Gomez came to the Employer's plant. With them on this occasion was one of the Union's attorneys, Pedro Baiges Chapel, who was present among other reasons because a warrant had previously been issued for the arrest of Grant. Over the protest of a guard stationed at the plant gate, the group entered the plant premises. Certain events transpired on the premises which are not particularly germane here. In sum, however, it appeared that the purpose of the union officials' visit was to discover why the Employer's representatives had not appeared at the Department of Labor meet-

ting which had been scheduled the previous day. The union officials learned in this connection that the Employer was concerned about the violence that was occurring, that the Employer would not negotiate until the violence ended and, further, that the Employer objected to the participation of Grant in any bargaining negotiations. During the interim the police, who had been summoned by the plant guard, appeared at the plant premises. So far as the record shows, the police took no action but Grant and his companions left the premises and stationed themselves on the street immediately outside the plant gate. This was during the noon hour when the employees were on their lunch break. About 50 to 100 employees were present at that time in the immediate area of the plant gate.

It is undisputed that Grant addressed the employees on this occasion over a loudspeaker located on the street outside the plant gate. Several witnesses testified with substantial consistency as to the tenor of Grant's remarks which were about 10 to 20 minutes in duration. The net of Grant's remarks, according to these witnesses, was that the Employer was refusing to negotiate, that the Union would compel the Employer to negotiate, that the Employer was seeking to exclude the Union from the plant, and that if the Employer continued closing its gate, they (the Union) would break it down.[5]

Grant, in his testimony, essentially confirmed this account of his remarks to the employees over the loudspeaker. Asked whether he had during the course of his remarks threatened "to destroy the Company property – the gates – or break them down," Grant replied, "I said something similar to that." Grant testified further that he told the employees that

> all this maneuvering and all this violence of the Company was

[5] The evidence is in conflict as to whether the Employer had always kept its gate closed except to those who had legitimate business at the plant or whether the practice of closing the plant gate was a recent development. I find it unnecessary to resolve this issue.

> with the intention of stepping on the right of each one of the employees to be represented by the Union and that neither the employees nor us could permit that we be stepped on by the Company and that for that reason we were going to impede the force of the Company to intimidate the employees; *that they were closing the gates which they had never closed before, and that if this was done to prevent us from going in that it was useless because we could knock them down* . . . . [Emphasis supplied.]

The only inconsistent testimony in this regard was given by Osvaldo Romero. Romero testified initially that he did not remember precisely but that possibly Grant did talk about breaking the fence or gate. Later Romero specifically denied that Grant said the Union would knock down the gates if the Employer closed them, or that Grant said anything like that. In view of uniform testimony to the contrary and, particularly, Grant's own admissions, I do not credit Romero's denials.

In sum, I conclude and find that on September 19, 1974, Respondent's agent, President Arturo Grant, in the course of addressing Respondent's employees over a loudspeaker threatened that if the Employer closed its gates, the Union would knock them down.

Conclusionary findings as to Case No. 24-CB-907

I have already found herein that at the final bargaining meeting of August 22, 1974 between the Employer and the Union at which employees of the Employer were present, Arturo Grant toward the close of the meeting announced that it was better to close the meeting because he was at the point of starting a fight and that, a few minutes later, told one of the employee representatives at the meeting, "You keep quiet because I am about to start slapping people here." True, the latter remark was addressed to an employee representative and not to the Employer's representative. However, the term

"people here" was inclusive, and, in any event, Grant's announced intention to resort to physical force if necessary, could not have other than a coercive and intimidatory effect upon all who were present, and particularly upon the employees in the exercise of their right guaranteed by Section 7 to engage in free collective bargaining.

Similarly, the finding heretofore made that Grant and his fellow union agents physically attacked Supervisor Ortiz in the presence of employee Rosario, physically attacked Rosario, and that Grant and Rodriguez threatened to kill Rosario, gives concrete content to Grant's earlier announced willingness at the August 22 meeting to resort to violence to achieve the Union's objectives. A more dramatic demonstration of restraint and coercion of employees and the hazards of failing to cooperate and differing with the Union can scarcely be presented.

Finally, I have found, as Grant virtually admits, that he told the employees of the Union's intention to break down the gates of the plant to further the Union's objectives. This could only increase the apprehension of the employees as to the consequences of a free exercise on their part of their organizational and collective-bargaining rights and is plainly restraint and coercion of employees in the statutory sense.

On the whole record, I conclude and find that by the foregoing acts and each of them, the Union and its agent Arturo Grant violated Section 8(b)(1)(A) of the Act. *Surgical Appliances, Inc.*, 203 NLRB No. 11 (1973).

C. Case No. 24-CB-3548

The critical allegation in the complaint in this case is that the Employer, since on or about September 19, 1974, refused to meet and bargain collectively with the Union as the exclusive bargaining representative of the Employer's employees comprising an appropriate unit.[6] The Employer denies

[6] There is no dispute as to the composition of the appropriate unit for which the (continued)

this allegation and denies that the Union is currently the exclusive bargaining representative of the employees comprising the appropriate unit. The Employer in its answer to the complaint also advances several affirmative defenses. In substance the Employer pleads that because of the Union's unremedied acts of violence and threats, the Employer is under no obligation to bargain; that the Employer is entitled, because of such violence and threats, to a revocation of the Union's certification as bargaining representative; and that since August 22, 1974 a valid bargaining impasse has existed between the Union and the Employer, terminating any further obligation on the part of the Employer to meet and bargain collectively with the Union.

Certain preliminary, albeit critical, facts are undisputed. As already noted, the Union was certified on May 22, 1974, pursuant to a Board election, as the exclusive bargaining representative of the Employer's production and maintenance employees.[7] Pursuant to that certification the Employer and the Union held several bargaining meetings. The last such meeting occurred on August 22, 1974. A further bargaining session, agreed to by the parties and scheduled for September 18, 1974 at the Department of Labor in San Juan, did not take place because the Employer did not attend. At the instant hearing the parties stipulated that the Union made further requests for bargaining sessions and that the Employer received these requests. These requests were not acknowledged and no further bargaining took place.

[6] (continued)
Union had been certified on May 22, 1974 as exclusive bargaining representative. The complaint alleges, the answer admits, and I find that all production and maintenance employees employed by the Employer at its factories in Mayaguez, Puerto Rico, but excluding the driver, all office and plant clerical employees, technicians, professional personnel, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

[7] The record is devoid of any suggestion that the majority status of the Union, established in certification proceeding, no longer exists.

In the normal situation the continuing obligation of an employer to meet and bargain with a union which has been certified as the bargaining representative of his employees in an appropriate bargaining unit is not subject to challenge. This is particularly true where, as here, the refusal of the employer to meet and bargain with the Union occurs months before the initial certification year has expired. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96 (1954). It appears, therefore, that the Employer's violation of Section 8(a)(5) of the Act is patent unless the Employer's proffered defenses have merit. These defenses are considered hereunder.

Apart from its strictly affirmative defenses, the Employer proffers no independent evidence in support of its denial that the Union is no longer the exclusive bargaining representative of its employees in an appropriate unit. True, the Employer has made a motion to revoke the Board's certification of the Union as such representative. However, it seems fair to assume that determination of that issue turns on the identical considerations which the Employer urges as grounds for relieving it of its bargaining obligation.

As noted, one of the propositions urged by the Employer is that "[s]ince August 22, 1974 a valid impasse existed in negotiations held between [the Union] and the Employer" (Paragraph 5 of the Affirmative Defenses listed in the Employer's Answer). I find this defense to be without merit.

To be sure, the Employer did submit a complete counterproposal to the Union at the meeting of August 22, 1974 and denominated that counterproposal as its "final offer" with a request that it be submitted to the union membership for approval. As noted, the Union negotiators indicated dissatisfaction with the counterproposal at the meeting. Subsequently, it was rejected by the Union membership. Yet practical and long experience in labor relations refutes the notion that this series of events necessarily precluded the possibility or even the probability of further fruitful negotiations. Indeed, the Employer

here did not consider the meeting of August 22 as closing the door to further bargaining. As shown by the testimony of its own witness, Attorney Victor M. Comolli, arrangements were proposed a week after the August 22 meeting, and thereafter consummated, for a further meeting between the Company and the Union to be held on September 18, 1974 at the Department of Labor. No mention was made of an impasse. Instead, it was assumed that with a cessation of violence and a change of union negotiators it would be possible "to iron out the wrinkles" in the bargaining negotiations.[8]

In view of the totality of the evidence, the fact that only a limited number of bargaining sessions had been held, the fact that the August 22 meeting was the first at which the Employer had submitted a complete counterproposal, the fact that no one suggested at the time that an impasse existed, and the fact that the parties themselves agreed that further bargaining negotiations might serve a useful purpose, I am satisfied and find that no impasse existed.

More serious, however, and of greater import is the Employer's contention that it was relieved of its statutory duty to meet and bargain with the Union because of the Union's misconduct already described and discussed earlier in this Decision. In this connection the Employer cites and relies upon *Laura Modes Company*, 144 NLRB 1592 (1963), and related cases (See Employer's Brief to the Administrative Law Judge p. 15, *et. seq.*). Concededly, the misconduct of the Union engaged in by its president, Arturo Grant, and by other admitted agents of the Union was of a serious nature and is not to be condoned. On the other hand, equally to be shunned is the frustration of the right of the Employer's employees, who were not directly involved in the misconduct here found, to be represented by a bargaining representative of their own choosing, a choice made by them several months earlier with all the pro-

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[8] The September 18 meeting, as already noted, did not take place.

tection afforded in a Government-conducted secret ballot election.

The balance between these competing interests is not always easy to strike. The Employer here, however, in his above-cited brief, after all the evidence was submitted and contentions advanced, submits what I believe and find to be an appropriate criterion for resolution of this issue in the instant case. The Employer states (Brief, p. 11):

> It is respectfully submitted to the Administrative Law Judge that the Company's position is that it is not bound to bargain with the Union until it gets assurances that the Company negotiating committee will not be threatened in any manner nor that Company employees will be assaulted or threatened with death nor company property subjected to attack or threats of attack.

Those assurances are here provided. The misconduct of the Union here alleged and found is violative of Section 8(b)(1)(A) of the Act and, pursuant to the statutory scheme, continuation of such misconduct will be enjoined by the Order entered herein. That order, to the extent necessary and appropriate, is subject to Board affirmance and court enforcement including the application of contempt sanctions, if warranted.

The sole remaining objection to entry of a bargaining order against the Employer is the Employer's understandable disinclination to sit down at a bargaining table with Arturo Grant, whose behavior generally and at the bargaining conference of August 22 particularly, prompts its legitimate apprehension to further negotiations with him. As the record demonstrates, however both the Union and Arturo Grant have already volunteered that he will not further participate in Employer-Union negotiations. Appropriate, therefore, is a provision in the remedial order to be entered herein, as General Counsel indeed urges, to insure that Arturo Grant not participate in such further bargaining negotiations. In such a frame of reference I believe the respective rights and interests of both

the Employer and employees are fully served. I believe further that this accommodation comports with the principles enunciated in *Laura Modes, supra,* as elucidated in *Casade Corporation,* 192 NLRB 533 (1971), and quite recently in *New Fairview Hall Convalescent Home,* 206 NLRB No. 108 (1974).

Accordingly, I conclude and find that the Employer, by refusing to meet and bargain collectively with the Union as the exclusive bargaining representative of the Employer's employees in the appropriate unit found herein violated Section 8(a)(5) and (1) of the Act.[9] I find further that there is no meritorious bar to the entry of a bargaining order framed in the manner herein described. By the same token I find no warrant for granting Respondent's request and/or motion to revoke the certification of the Union.

Conclusions of Law

1. Union Nacional de Trabajadores is a labor organization within the meaning of Section 2(5) of the Act.

2. Arturo Grant is an agent of the above-named union within the meaning of Section 2(13) of the Act.

3. The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., constitute a single integrated enterprise which is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. All production and maintenance employees employed by the above-named Employer at its factories in Mayaguez, Puerto Rico, but excluding the

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[9] The complaint does not allege this conduct to be violative of Section 8(a)(1). However, an unlawful refusal to bargain derivatively interferes with the right of employees guaranteed in Section 7 of the Act to engage in collective bargaining and hence derivatively violates Section 8(a)(1). I so find.

driver, all office and plant clerical employees, technicians, professional personnel, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. By the acts and conduct described in section II B, above, the above-named union and its agent Arturo Grant violated Section 8(b)(1)(A) of the Act.

6. By the acts and conduct described in section II C, above, the above-named Employer violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. There is no warrant for revoking the certification of the above-named union as exclusive bargaining representative of the Employer's employees in the above-described unit.

Remedy

Pursuant to the mandate of Section 10(c) of the Act, cease and desist orders will be entered against the Union and its agent Arturo Grant and against the Employer enjoining them from engaging in the specific illicit conduct in which they have been found to have engaged. General Counsel and the Employer also join in a request that a broad cease and desist order be entered against the Union and Arturo Grant enjoining them from restraining or coercing employees in any other manner in the exercise of the rights guaranteed them by Section 7 of the Act. In view of a similar pattern of violence in which the Board found this same union to have engaged in *Surgical Appliances, Inc.*, 203 NLRB No. 11 (1973), and in view of the open and pervasive character of the violence and threats found herein, I find that a proclivity on the part of the Union to violate the Act has been established and that a broad order is appropriate. I shall so recommend.

In addition, the Employer, but not the General Counsel, asks for special remedial relief against the Union in the form of provisions directing that the Union reimburse the Employer for its attorney's fees and costs in the present proceeding and that the Union notify the employees at their homes of its violations of Section 8(b)(1)(A). With respect to the request for litigation costs, the Board only a few weeks ago gave a painstaking review of its controlling rationale as to the imposition of such extraordinary remedies. See *Heck's, Inc.*, 215 NLRB No. 51 (1975). It would be superfluous to restate that rationale here. Significant, however, is the Board's comment (sl. op., p. 11) that it is "a continuing function of this administrative agency to consider on a case-by-case basis, in the light of both our experience and the facts of each case, what remedy will best remedy the misconduct found." In the instant proceeding we are confronted with charges of unfair labor practice by the Employer against the Union and by the Union against the Employer. In each instance I have found merit to the charges. Without weighing the relative gravity of the offenses found, it would appear inappropriate in such a situation to award special relief to either party by directing reimbursement of litigational costs. I deny the request for reimbursement of such costs. I likewise deny the request that the Union be required to notify the employees at their homes of its violation of the Act. Nothing in the record herein suggests that the employees here involved have transient or temporary employment or that they are unlikely to be reached if the customary notices are posted. Accordingly, I shall direct that the Union post the notices herein prescribed at its business offices and meeting halls and, in addition, that such notices be posted, the Employer willing, at the Employer's places of business. This should assure adequate publication to the employees affected.

So far as the order against the Employer is concerned, no special relief is requested. In addition to directing the Employer to cease and desist from

its refusal to bargain and from engaging in like or related conduct, an affirmative bargaining order will be entered conditioned however on the proviso that the Employer will not be required to bargain with the Union if the Union is represented in the bargaining negotiations by Arturo Grant. Like the Union, the Employer will be required to post appropriate notices, and the usual reporting requirements will be imposed on both the Employer and the Union.

Upon the foregoing findings of fact and conclusions of law and upon the entire record, I hereby recommend the following:

ORDER[10]

Union Nacional de Trabajadores, and its agent, Arturo Grant, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., a single integrated enterprise, in the exercise of employee rights under Section 7 of the National Labor Relations Act, as amended, by violence or threats of violence directed against such employees or, in the presence of the latter, by violence or threats of violence against supervisors of such employees or by threats to damage company property.

(b) In any other manner restraining or coercing employees of the above-described integrated enterprise, or of any other employer, in the exercise of their rights under Section 7 of the Act.

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[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which is appropriate to effectuate the policies of the Act.

(a) Post at its business offices and meeting halls, in both English and Spanish translation, copies of the attached Notice marked "Appendix A."[11] Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative of the Union named herein and by its agent Arturo Grant, shall be posted by the said union immediately upon receipt thereof and shall be maintained by the said union for 60 consecutive days thereafter, in conspicuous places including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the said union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forward to the Regional Director for Region 24 signed copies of said notice for posting by the Employer named herein, if the latter is willing, at all locations where its notices to employees are customarily posted.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order what steps the said union and the said Arturo Grant have taken to comply herewith.

The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., a single integrated enterprise, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to meet and bargain collectively concerning wages, hours and other terms and conditions of employment with Union Nacional de

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[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Trabajadores as the exclusive bargaining representative of all the employees comprising the unit described hereunder:

> All production and maintenance employees employed at our factories in Mayaguez, Puerto Rico, but excluding the driver, all office and plant clerical employees, technicians, professional personnel, guards and all supervisors as defined in Section 2(11) of the Act.

PROVIDED THAT the above-described employer shall not be required to so bargain if the said union's agent, Arturo Grant, appears as its negotiating representative or one of its negotiating representatives at a bargaining meeting with the said employer.

(b) Engaging in like or related unlawful conduct.

2. Take the following affirmative action which is appropriate to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively with the above-named labor organization as the exclusive bargaining representative of the employees in the unit described above with respect to wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement; PROVIDED THAT this requirement to meet and bargain with the said labor organization shall not be applicable if the latter's agent Arturo Grant is designated as its negotiating representative or one of its negotiating representatives at a bargaining meeting with the said employer.

(b) Post at its places of business in Mayaguez, Puerto Rico, in both English and Spanish translation, copies of the attached Notice marked "Appendix B."[12] Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative of the

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[12] See footnote 11 above.

employer named herein shall be posted by the said employer immediately upon receipt thereof and shall be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 24, in writing, what steps have been taken by the said employer to comply herewith.

Dated at Washington, D.C., February 13, 1975.

/s/ Arnold Ordman
Arnold Ordman
Administrative Law Judge

Form NLRB-4708 (5-69)

JD-68-75

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT coerce or restrain employees of THE CARBORUNDUM COMPANY OF PUERTO RICO and CARBORUNDUM CARIBBEAN, INC., in the exercise of their rights under the National Labor Relations Act, as amended, by engaging in violence or threats of violence against such employees or against supervisors of such employees and we will not threaten to damage company property.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of their right to engage in organizational or collective bargaining activities, or to refrain from such activities.

UNION NACIONAL DE TRABAJADORES
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

Dated _____ By _____
Arturo Grant Agent

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan Am Building - 7th Floor, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00917 (Tel. No. 106 - 622-0247).

FORM NLRB-4727 (5-69)

APPENDIX B

JD-68-74

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse, upon request, to meet and bargain collectively concerning wages, hours and other terms and conditions of employment with UNION NACIONAL DE TRABAJADORES as the exclusive bargaining representative of all the employees comprising the unit described below:

All production and maintenance employees employed at our factories in Mayaguez, Puerto Rico, but excluding the driver, all office and plant clerical employees, technicians, professional personnel, guards and all supervisors as defined in Section 2(11) of the Act.

WE WILL NOT engage in like or related unlawful conduct.

WE WILL, upon request, meet and bargain collectively concerning wages, hours and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of all the employees in the above-described unit.

All our employees are free to engage in organizational and collective bargaining activities, or to refrain from such activities.

THE CARBORUNDUM COMPANY OF PUERTO RICO
CARBORUNDUM CARIBBEAN, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan Am Building - 7th Floor, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00917 (Tel. No. 106 - 622-0247).

[July 30, 1975]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNION NACIONAL DE TRABAJADORES
AND ITS AGENT ARTURO GRANT

and

THE CARBORUNDUM COMPANY OF
PUERTO RICO AND CARBORUNDUM
CARIBBEAN, INC.

Cases 24-CB-907,
24-RC-5263, and
24-RC-5264[1]

THE CARBORUNDUM COMPANY OF
PUERTO RICO AND CARBORUNDUM
CARIBBEAN, INC.

and

UNION NACIONAL DE TRABAJADORES

Case 24-CA-3528

DECISION AND ORDER

On February 13, 1975, Administrative Law Judge Arnold Ordman issued the attached Decision in this proceeding. Thereafter, Respondent Employer and Respondent Union filed exceptions[2] and supporting briefs and Respondent Employer filed a brief answering Respondent Union's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, find-

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[1] In light of the Employer's motion to revoke Respondent Union's certification of representative in Cases 24-RC-5263 and 24-RC-5264, we have consolidated those cases with the proceedings herein.

[2] Respondent Union has excepted to the fact that these proceedings have been conducted in English rather than Spanish, and to our requirement that it furnish complete translations in English of its exceptions to the Administrative Law Judge's Decision. We find its contentions to be without merit. See *Carmona v. Sheffield*, 325 F.Supp. 1341 (D.C. Calif., 1971), affd. 475 F.2d 738 (C.A. 9, 1973).

ings,[3] and conclusions of the Administrative Law Judge to the extent consistent herewith.

1. Consistent with the findings of the Administrative Law Judge, these are the critical facts in this case:

On May 22, 1974, the Union was certified as the exclusive bargaining representative of the Employer's production and maintenance employees. Thereafter, the Union and the Company held a number of bargaining sessions which failed to yield a collective-bargaining agreement. At the negotiations held on August 22, 1974, the last meeting between the parties, the Union's president, Arturo Grant, reacted to the Company's final contract proposal by announcing that it was better to conclude the meeting because "I'm at the point of starting a fight." When an employee on the Union's negotiating committee started to address a remark to the Company's negotiators, Grant looked at the employee and said, "You keep quiet because I'm about to start slapping people here." At this point, the Company's representatives agreed it was best to leave the meeting, which they did.

About a week later, a union official, Radames Acosta-Cepeda, telephoned Employer's attorney, Victor Comolli, and asked if Comolli would intervene to convince the company negotiators to continue meeting with the Union. Comolli commented that the negotiators had been threatened by Grant at the August 22 meeting and were afraid to meet with the Union. Acosta-Cepeda replied that he would take charge of the negotiations for the Union and again requested Comolli's assistance in reinstituting

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[3] The Respondent Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

negotiations. Comolli agreed to contact his client and, a few days later, Acosta-Cepeda again telephoned him. During this second conversation, Comolli informed Acosta-Cepeda that he had told the company negotiators that Acosta-Cepeda was now in charge of the negotiations for the Union. Comolli also told him that the Company would meet with the Union on the condition "that the Union cease in all kinds of threats, disrespectful tactics, violence, or disruptions in the plant," and on the further condition that the meeting be held in San Juan at the offices of the Department of Labor and in the presence of a Government mediator. Acosta-Cepeda agreed to these conditions, and Comolli immediately contacted the proper Government authorities and set up a meeting for September 18, 1974.

That meeting was never held. On the morning of September 17, 1974, Arturo Grant and three other union agents entered the Employer's plant against the instructions of the plant guard. Once inside the Employer's premises, they physically attacked and beat a supervisor, Ortiz Cano, and an employee, Jenero Rosario. As the four union officials left the scene of the beatings, Arturo Grant stated, "This one we are about to kill," referring to employee Rosario who was slumped on the floor. Rosario had acted as an organizer for the Independent, Respondent Union's rival, during the earlier election campaign which culminated in Respondent Union's certification.

The Company did not appear at the bargaining session scheduled for September 18. Shortly before noon on the following day, September 19, Arturo Grant, accompanied by an attorney and the same union officials who had accompanied him during the September 17 incident, again entered the Employer's plant, ignoring the protest of the plant guard, who then telephoned the police. Once inside, they inquired as to why the Company's representatives had not appeared at the meeting arranged for the day before, and again were told that the Employer was concerned about the Union violence, that it would not negotiate

until the violence ended, and that it objected to Grant's further participation in any bargaining sessions. When the police who had been summoned by the guard arrived, Grant and his companions left the premises.[4] Shortly afterwards, Grant stood outside the closed plant gate with a loudspeaker and addressed a group of 50 to 100 of the Company's employees who were on their lunch-break. Grant stated that the Employer was refusing to negotiate, that the Employer was seeking to exclude the Union from the plant, and that if the Employer continued closing its gates they would knock or break the gates down. After this final incident, the Union made several requests for bargaining sessions, but no further bargaining occurred.

We agree with the Administrative Law Judge that the Respondent Union and its agent Arturo Grant violated Section 8(b)(1)(A) of the Act by each of the following acts committed against employees or in the presence of employees: (1) the threat of physical violence made at the negotiating session on August 22, 1974; (2) the physical violence and bodily injury inflicted upon Supervisor Ortiz Cano and employee Jenero Rosario, and the threat to kill Rosario on September 17, 1974; and (3) the threat to knock or break down the gates of the Company's plant on September 19, 1974.

Notwithstanding this violent misconduct, the Administrative Law Judge concluded that the Company was not justified in refusing to meet and bargain with the Union thereafter. The Company submitted that it was not bound to bargain until it received assurances that its negotiators would not be threatened, that its employees would not be assaulted and threatened with death, and that its property would not be subjected to attack or threats of attack. The Administrative Law Judge agreed with this contention. However, satisfied

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[4] The record reveals that a warrant had previously been issued for the arrest of Grant as a result of his misconduct during the September 17 incident.

that assurances against union misconduct were provided by his cease-and-desist order designed to remedy the Union's violations of Section 8(b)(1)(A), he proceeded to find that the Company violated Section 8(a)(5). We find merit in the Respondent Company's exception to this conclusion.

The record clearly establishes that prior to September 18 the Union engaged in violence and made threats which were unprovoked, pervasive in character, and destructive of an harmonious bargaining relationship. We would not expect or require an employer to sit down and bargain with a union guilty of such misconduct absent adequate assurances against continuation thereof. In this case, the Respondent Company had not received such assurances at the time of its alleged unlawful refusal to meet with the Union. As the Administrative Law Judge recognized, any commitments which Acosta-Cepeda made to Comolli prior to the scheduled meeting on September 18 were rendered meaningless by the subsequent acts of violence and threats on September 17 and 19. But the Administrative Law Judge reasoned that his cease-and-desist order directed at the Union's misconduct provided the necessary assurances. We disagree. We cannot perceive how his order dated February 13, 1975, could mollify fears held 5 months earlier. Thus, we believe that the Company was warranted in refusing to meet and bargain with the Union following the Union's violent misconduct and, accordingly, we find that it did not violate Section 8(a)(5) of the Act.

2. The Company also excepts to the Administrative Law Judge's denial of its motion to revoke the Union's certification as exclusive bargaining representative of its production and maintenance employees. We believe this exception is also meritorious.

This labor organization, by its brutal and unprovoked physical violence in this case and by its extensive record of similar aggravated misconduct in

other recent cases,[5] has evinced an intent to bypass the peaceful methods of collective bargaining contemplated in the Act and commonly accepted and practiced by labor organizations and employers throughout the country. It has consistently exhibited an utter disregard for the orderly and lawful processes available under the Act, and has instead deliberately resorted to self-help through violence. This Union, though armed with a Board certification under the Act, has in this case, as well as in the cases cited above, evidenced a total disinterest in furthering the Act's policies of promoting collective bargaining and industrial peace.[6] Indeed, it has infected the bargaining process.

While we recognize the importance of the right of employees to be represented by their duly selected bargaining representative, we cannot continue to certify as a qualified bargaining representative a labor organization such as the Respondent Union which does not lawfully pursue its representation rights and is openly defiant of the authority of the Board and the teachings and purposes of the Act. Due to the atmosphere of fear and coercion generated by the Union's unlawful conduct, no constructive bargaining on behalf of the employees it represents is feasible. Thus, this Union has corrupted and frustrated

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[5] *Union Nacional de Trabjadores and its Agent, Alcides Serrano (Jacobs Constructors Company of Puerto Rico)*, 219 NLRB No. 65; *Union Nacional de Trabjadores and its Agent Arturo Grant (Macal Container Corporation)*, 219 NLRB No. 67; *Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga de Catalytic (Catalytic Industrial Maintenance Co., Inc.)*, 219 NLRB No. 66. See also *Union Nacional de Trabjadores and its agent Radames Acosta-Cepeda (Surgical Appliances Mfg., Inc.)*, 203 NLRB 106 (1973).

[6] The cases cited in fn. 5, *supra*, are replete with examples of this Union's contempt for the authority of the Act and the Board. In *Jacobs Constructors Company of Puerto Rico*, Union Agent Castro-Ramos testified at the hearing that he "does not recognize the authority of the law or of the Board that administers the law," and "people will understand that we are here against our will, and that we do not acknowledge any authority of the Board over us." He further stated, "The main [function of an organizer for Respondent Union] is to see that workers' rights are respected, that the laws that are in effect in this country be applied in a manner favorable to the workers and when they cannot be they should be violated."

the representative scheme of bargaining envisaged by the Act. In these circumstances, we believe it best serves the purposes of the Act and the legitimate interests of all concerned, without unduly impinging upon the right of the Company's employees to be represented by the union of their choice, to revoke the Union's certification as bargaining representative of the Company's employees. In addition, we shall deny the Union the right to invoke our statutory processes in aid of its demand for recognition with respect to these employees until an appropriate time when the employees are able to demonstrate their desires anew in an atmosphere free of coercion and the Respondent Union proves its majority among those employees through the Board's election process.[7]

ORDER[8]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Union Nacional de Trabajadores, Rio Piedras, Puerto Rico, and its agent Arturo Grant, their officers, agents, and representatives, shall

1. Cease and desist from:

(a) Restraining or coercing employees of The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., a single integrated enterprise, in the exercise of their rights under Section 7 of the National Labor Relations Act, by violence or threats of violence directed against such employees or in the presence of such employees, by violence or threats of violence against

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[7] See *Herbert Bernstein, Alan Bernstein, Laura Bernstein, a Copartnership d/b/a Laura Modes Company*, 144 NLRB 1592 (1963).

[8] In view of Respondent Union's repeated violations of the Act, whose authority it refuses to recognize, and considering the nature and extent of its unlawful conduct in the cases cited in fn. 5, *supra*, we have found it necessary to modify the Order recommended by the Administrative Law Judge in certain respects so as to better effectuate the policies of the Act and serve the public interest.

supervisors and other representatives of the Employer, or by threats of damage to the Employer's property.

(b) In any other manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its offices and meeting places in Puerto Rico copies of the attached notice marked "Appendix."[9] Copies of said notice, in English and in Spanish, to be furnished by the Regional Director for Region 24, after being duly signed by Arturo Grant and an authorized representative of the Respondent Union, shall be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forthwith mail copies of said notices, in English and in Spanish, to the Regional Director for Region 24, after said copies have been signed as provided above, for mailing of said notice by the Regional Director to each employee in Puerto Rico of The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., and to that Company for posting by it, if willing, at its premises at any location in Puerto Rico in places where notices to employees are customarily posted.

(c) Publish said notice at Respondent Union's expense, in all newspapers of general distribution published in Puerto Rico, and in any newspaper of

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent Union, in each case in the language in which the newspaper is printed.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent Union and its agent Arturo Grant have taken to comply herewith.

IT IS FURTHER ORDERED that the Certification of Representative heretofore issued in Cases 24-RC-5263 and 24-RC-5264 be, and it hereby is, revoked.

IT IS FURTHER ORDERED that the complaint in Case 24-CA-3548 be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., July 30, 1975.

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER KENNEDY, concurring:

I agree with my colleagues' finding that Respondent Union Nacional and its agent engaged in violations of Section 8(b)(1)(A) of the Act and that the Union's certification must be revoked.

I concur in the remedy which is being ordered in this case because, unlike *Catalytic Industrial Maintenance, Jacobs Construction,* and *Macal Container, supra,* there is no indication here that employees have lost wages because of the Union's misconduct.

Dated, Washington, D.C., July 30, 1975

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a full trial in which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we, Union Nacional de Trabajadores, and our agent Arturo Grant, violated the National Labor Relations Act, and has revoked our certification as exclusive bargaining representative of the employees of The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., and has ordered us to post this notice.

WE WILL NOT restrain or coerce employees of The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., a single integrated enterprise, in the exercise of their rights under Section 7 of the National Labor Relations Act by violence or threats of violence directed against such employees or, in the presence of such employees, by violence or threats of violence against supervisors and other representatives of the Employer, or by threats of damage to the Employer's property.

WE WILL NOT in any other manner restrain or coerce employees of The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL NOT act or claim to act as the collective-bargaining representative of the employees of The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc., unless and until we have been certified anew by the National Labor Relations Board.

You are free to retain your membership in this Union or to join any other labor organization, and by majority choice, to select at the appropriate time any union to represent you in bargaining with your Employer.

UNION NACIONAL DE TRABAJADORES
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

Dated _____ By _____
(Arturo Grant) (Agent)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan Am Building, seventh Floor, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00917, Telephone 809-622-0247.

UNION NACIONAL de TRABAJADORES
and ITS AGENT, ALCIDES SERRANO

and Case No. 24-CB-885

JACOBS CONSTRUCTORS COMPANY OF
PUERTO RICO
September 26, 1974

. . . . . .

DECISION

Statement of the Case

JOSEPHINE H. KLEIN, Administrative Law Judge: Pursuant to a charge filed on April 8, 1974,[1] by Jacobs Constructors of Puerto Rico (the Company) against Union Nacional de Trabajadores (the Union) and Alcides Serrano, stated to be the Union's agent, a complaint was issued on June 7 alleging that on various occasions between April 2 and 19, during and after a strike against the Company, the Union, through Respondent Serrano and another agent, engaged in various acts of coercion and other misconduct in contravention of Section 8(b)(1)(A) of the Act.[2]

Pursuant to due notice, a hearing was held before me in Hato Rey, Puerto Rico, on July 18 and 19. All parties were represented by counsel and were afforded full opportunity to present oral and written evidence and to examine and cross-examine witnesses. Counsel for Respondent presented brief oral argument and a post-trial brief has been filed by the Charging Party.

Upon the entire record, together with careful observation of the witnesses and consideration of the brief, I make the following:

Findings of Fact

I. Preliminary Findings

The complaint alleges, the answer admits, and I find that:

A. The Charging Party, a Puerto Rico corporation, with its principal office and place of business in Hato Rey, Puerto Rico, is and has been at all times material herein engaged in performing engineering, construction and

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[1] Unless otherwise indicated, all dates herein are in 1974.

[2] National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq*).

related services. During the past year, a representative period, the Company purchased and caused to be transported and delivered to its places of business in Puerto Rico piping, paneling and other construction goods and materials valued in excess of $50,000 directly from points outside Puerto Rico. The Company is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. The Respondent Union, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. The Facts

At the time here involved, Respondent was engaged in constructing storage tanks and related pipes at a pollution control installation at Arecibo, Puerto Rico. Damian Cruz-Pabon was office manager at the project and Joseph Gresh served as project construction superintendent. Juan G. Pereira-Zayas, the Company's comptroller, and Evelio Gonzalez-Pomales, a project engineer, both with offices in Respondent's executive office in Hato Rey, also became involved in the matters with which this complaint is concerned. Cruz, Pereira and Gonzalez all testified on behalf of the General Counsel. Gresh is no longer associated with Respondent and could not be located at the time of the hearing.

There were approximately 22 workers, including 4 "foremen."[3] Employee Serrano, the individual Respondent, did not appear or testify at the hearing.[4]

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[3] The status of the "foremen" under the Act is not an issue in the present proceeding. Pereira gave hearsay testimony that the foremen joined the strike out of fear. No finding is made on the basis of that testimony.

[4] In his brief, counsel for the Company says that Serrano "was present" on July 17, when the trial was originally scheduled to begin and was postponed until the next day. The record, however, does not reflect Serrano's presence at any time.

Respondents' only witness was Elias Samuel Castro-Ramos, organizer for the Respondent Union.[5]

Cruz, Pereira and Gonzalez gave consistent and substantially mutually corroborative testimony. Therefore the summary of the General Counsel's evidence is based largely on a composite of their testimony.

On March 28 Serrano, speaking on behalf of all the employees, complained to Cruz and Gresh about what the employees deemed inadequate medical insurance. According to Cruz, Serrano was excited and hostile at that time. Cruz immediately communicated with Pereira, who arranged to have a representative of a medical insurance company visit the project the following Tuesday, April 2, and the employees were so informed.

On Monday, April 1, the employees worked in an atmosphere of complaints and hostility, principally on the part of Serrano. But there is no evidence that the employees gave any indication or warning at that time that they expected to strike. Union organizer Castro, however, testified that on Monday afternoon he was informed of the strike by Serrano and again on Monday evening by the president of the Boilermakers Union. Castro also testified that Union authorization cards had been distributed sometime during the previous week.

When Cruz and Gresh arrived at the project before 7 a.m. on Tuesday, all the employees (including the four "foremen") were already there but on strike. Cruz testified that Serrano, in an agitated manner and using obscenities, was leading the assembled employees. He had employees execute Union authorization cards at that time. Sometime later, a representative of an insurance company arrived and an improved insurance plan was explained to all the employees. Thereupon Cruz said that, since they had got their demand, the

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[5] Ramades Acosta-Cepeda, Respondent Union's secretary-treasurer, was called as an adverse witness by the General Counsel and testified briefly.

employees should return to work. Serrano, however, as spokesman, said that it was now too late; the employees now wanted to be represented by the Union.

Pereira arrived a little later and joined Cruz and Gresh in the trailer which housed the project office. Union organizer Castro also arrived on the scene and apparently spoke with the employees for a while and then entered the trailer, follow immediately by Serrano and approximately three additional employees. Identifying himself as a Union organizer,[6] Castro said that they had Union authorization cards from all the employees and asked Pereira to negotiate with the Union. Pereira refused. At the request of Pereira and Cruz, the employee delegation left the trailer, but said they would return. Around 11 a.m. Castro and Serrano again approached the three Company representatives. According to Cruz, Serrano spoke for the employees at this time. Cruz quoted Serrano as saying: "I have cards signed by the employees also and I'm also an organizer for Union Nacional and we want to negotiate." Serrano was speaking so excitedly and loudly that Gresh ordered him to lower his voice, whereupon Serrano hurled derogatory epithets and said to Gresh: "You, I'm going to bust your face and I'm going to force you out of here, you are going to have to leave." During this meeting Castro repeated the employees' demands, which now included wage increases to the levels recently achieved by the Union at another company and increased safety equipment as well as discharge of Cruz and Gresh. Castro said that the Union would withdraw from the picture if the Company met the stated demands. Pereira

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[6] Jacobs' representatives testified that Castro identified himself as Ramades Acosta-Cepeda, an officer and organizer of the Union. Actually, Acosta visited the project only for about half an hour on Thursday, April 4. It does not appear that he spoke to any Company representative. Whatever the reason was for the mistaken identity, the evidence is clear that Castro served as the Union organizer but was known as Acosta to Jacobs' representatives.

continued to reject the bargaining demands, stating that he had no authority to negotiate.

Cruz and Pereira testified that sometime during the morning of Tuesday, April 2, a representative of the Environmental Quality Board (a local government agency) drove onto the premises. When he emerged from his car and started toward the trailer-office, he was confronted by Serrano and other employees, who excitedly asked the visitor what he was doing there. They blocked his way to the office and forced him to return to his car. According to Cruz, Serrano "told the man to take off his glasses that he was going to hit him and told him he didn't have a damn thing to do there." As the man was leaving, "[t]he group and particularly Mr. Serrano told him that if he were to return they would break his bones." The employees wrote down the visitor's automobile registration and Serrano "told him that if he returned they would tear up his car." Castro was present throughout this time but said nothing.

On Wednesday morning, Jose Coppen, Jacobs' manager of operations for Puerto Rico, accompanied Pereira to the site. Stating that the Company agreed to meet all their demands, Coppen asked why the employees were striking. Serrano said that they had complained for 2 weeks and nothing had been done. He complained that the Company still had not produced "a written promise," although on Tuesday Pereira had said he would bring one.

On the morning of April 3 a supplier of Jacobs delivered a box. Serrano, with several other employees, grabbed the box out of Cruz's hand, threw back into the supplier's truck, closed the truck door, and loudly ordered the driver to leave. The driver readily complied.

On Wednesday afternoon, while Serrano was absent, some employees, led by employee Andres Antiles-Crespo, visited the office and offered to return to work if assured that there would be no reprisals. Cruz agreed. The employees

then asked to be paid for the 2 days of the strike. Gresh rejected that demand as setting a bad precedent. The employee group then went to consult their fellow workers. When they returned to state that the strike would continue, Gresh offered to pay for 1 of the 2 days. The employee delegation again went to consult their colleagues. At this point Serrano arrived. When informed of the negotiations, Serrano assumed control and asserted the sole right to set the terms for returning to work. He said: "Nobody is going back to work, we are going on with the strike." Thereupon all the employees left the premises.[7] According to Pereira, Castro was present at the time but said nothing.

Cruz testified that on Wednesday and again on Thursday Serrano left the project and later returned with some 8 to 12 men who, carrying pipes and sticks, mingled with the striking employees. Serrano announced that he had brought a "gang with [him] to back [him] up so that no one will go to work."

On Thursday another supplier attempted to deliver material. The truck-driver was "intercepted" by Serrano and other employees. The driver left the premises when Serrano said the employees were onstrike and did not want any deliveries made.

The strike continued. According to Cruz and Pereira, the Company sought police protection on Thursday, and a police lieutenant and four or five police officers were present at the project from Thursday afternoon until around 2 or 2:30 p.m. on Friday, after all the employees had been paid and had left the premises.

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[7] Pereira testified that one employee later visited the office and said that he wanted to accept the Company's offer "but that the rest of the employees were scared, afraid to come back to work." No finding is here made on the basis of this hearsay evidence.

On Friday, April 5, Pereira, accompanied by Harold Spence, a representative of Jacobs' parent company, and Eduardo R. Estrella, Esq., an attorney for Jacobs, again visited the project. Pereira started to distribute among the striking employees a pamphlet (or flyer) setting forth the Company's commitment to meet all three of the employees' demands. In addition, the Company agreed to pay wages for half the time of the strike. Serrano prevented Pereira's giving pamphlets to all the employees. Serrano "told the employees not to accept those promises, not to rely on them, that the company was going to start taking reprisals against the employees." At that point Castro approached and tried to talk with Pereira. When Pereira said he had nothing to say to Castro, Castro then asked if Pereira wanted to fight. Pereira declined the invitation to fight and repeated that he had nothing to discuss with Castro. Attorney Estrella intervened, sent Pereira into the trailer-office and proceeded to talk with Castro. The nature of their discussion does not appear.

According to Cruz, on Saturday a final settlement of the strike was negotiated by Pence, Pereira and Estrella on behalf of the Company, with Atiles for the employees. It appears that both Serrano and Castro were present when the strike settlement was negotiated but did not actively participate in the negotiations.[8]

Castro testified that the Union did not become involved until after the employees had decided to strike. After testifying that he first heard of the strike on Monday evening from the president of the Boilermakers Union, Castro then said he first learned of it from Serrano on Monday afternoon. Castro first visited the project on Tuesday, after the strike had begun and Serrano had obtained Union cards from all the employees. It was also apparently after the

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[8] Cruz testified that it would not be "legal" for the Company to negotiate a settlement with Serrano. He did not explain this statement. However, it is clear that the Company refused to recognize the Union absent an election and certification.

insurance company representative had spoken to the employees. Castro testified that when he first spoke to management representatives on Tuesday he said that the Union would withdraw if the Company met the employees' demands and Pereira promised to give an answer concerning the medical insurance the next day. However, Castro also testified that on Tuesday he told management that he had Union authorization cards from all the employees and demanded that Pereira negotiate a collective-bargaining agreement. According to Castro, "[a]fter the strike started, when they saw that the company did not want to settle as to the medical plan, that they only promised things, the workers decided that one of their demands would be recognition of the union because they understood that this was the only way they would be well represented and so that the company would not continue making promises but would execute a collective bargaining agreement." Pereira said he had no authority to negotiate a contract, but the medical insurance question was under consideration and Pereira would give an answer the next day. Castro further testified that on the next day, Wednesday, Pereira did not produce anything on the medical plan and thus the strike continued. Castro testified that at that time, with all the employees present, he was seeking "a solution to the immediate demands in order to end the strike and if those demands were met the people would come in to work, but then we would have to sit down and negotiate a contract."

Castro testified that on Thursday Pereira "came with the demands satisfactorily met, according to him, but they were not in writing and the workers believed that if they were not in writing they did not want them." So the workers stayed out on strike. On Friday, Pereira produced a writing, but since it was "not signed by hand," it was not immediately accepted. According to Castro, the workers said they would return to work on Monday if they received a properly signed document and a guarantee against reprisals. The

necessary papers were provided Monday morning and the employees went back to work after Castro read to them the Company's promise not to take reprisals.

Castro generally denied that there had been any violence at the project while he was present. He also denied, though somewhat vaguely, that Serrano had made any threats in Castro's presence. Castro did not, and obviously could not, deny or contradict the testimony by General Counsel's witnesses as to specific conduct by Serrano when Castro was not present.

The Union filed a representation petition that afternoon, April 8. That petition has been held in abeyance pending proceedings on the present charge, which was filed the same day.

On April 17, Castro visited the project and talked to the employees. When Gresh said that Castro should not talk to the employees on working time, but should awiat their free time, Castro replied that "he would talk to the employees whenever he felt like it." When Gresh then ordered him off the premises, Castro replied "that he would not get out, that if anyone wanted to get him out they could come and get him out." Castro added that "if anybody had intentions to fight with him he would fight."

Around April 17 the Company decided to discharge Serrano. Cruz and Gonzalez, a project engineer for Jacobs, testified that on April 19 Serrano and another employee entered the trailer-office carrying hammers. Serrano demanded to know the identity of the "scum" (or otherwise derogatorily described person) who had decided to discharge him. When Gresh acknowledged responsibility, Serrano, raising the hammer in his right hand, said: "I'm going to break up your face." According to Gonzalez, Serrano said he was going to "kill" Gresh. The fellow employee restrained Serrano, who thereupon swung his left hand, hitting Gresh and pushing him against the wall of the trailer. Serrano agitatedly shouted a variety of epithets until some fellow employees, "hearing this commotion walked in and grabbed him and got him out

of the trailer." Outside, after freeing himself from the restraint of his co-workers, Serrano picked up a pipe and shouted: "Anyone who stops me I'm going to bash in his head." Addressing Gresh and Cruz, who were at the entrance of the trailer, Serrano said, "I'm going to smash your car," whereupon he struck Cruz's car with the pipe, doing an unspecified amount of damage thereto.

At that point Gonzalez left the premises in his car to seek police protection. (At the time there were no telephone facilities at the project.) Some employees convinced Serrano that, since he had struck Gresh and was thus subject to an assault charge, it would be the better part of valor for him to leave. Serrano then handed in his equipment, signed necessary papers, got his pay and left the premises.

The Union later filed a charge alleging that Serrano had been discharged in violation of Section 8(a)(3). The charge was dismissed.

B. Discussions and Conclusions

Serrano, named as a respondent in the charge and complaint, was represented by counsel in these proceedings. However, as previously noted, he did not appear or testify at the hearing. His unexplained failure to testify requires an inference that his testimony would not support a defense to the complaint. Because of Castro's limited personal knowledge and sketchy examination, most of the testimony of the General Counsel's witnesses was uncontradicted.

Respondent's counsel contends that, although most of the General Counsel's evidence was uncontradicted, it does not warrant a finding of threats or violence by Serrano or Castro because it does not appear that any criminal proceedings were instituted against them. The presence or absence of criminal proceedings is not determinative. Whether Respondents committed unfair labor practices as alleged in the complaint will be decided on the basis of the evidence in this record.

Respondents' counsel also argued that the General Counsel failed to meet his burden of proof because he did not present "any employees as witness to the fact that he had been coerced or threatened or beaten by anybody." The complaint does not allege any threats or violence aimed directly against employees. The gravamen of the complaint is that Respondents coerced employees and interfered with their statutory rights by engaging in conduct in the presence of employees which would have the necessary tendency to restrain their freedom of action.

It is unnecessary for the General Counsel to establish as a fact that any employees actually were coerced. The employees could hardly fail to get the message conveyed by the presence in their midst of a "gang" of outsiders armed with pipes and sticks, or Serrano's protestations, for example, that he "knew how to cut faces."

Additionally, it should be observed again that Respondents did not produce any employees as witnesses to contradict the General Counsel's witnesses. It is reasonable to assume that if the employees had voluntarily and freely signed Union authorization and membership application cards, they might be willing witnesses on behalf of the Respondents.

It is well established "that threats made against others in the presence of strikers coerced the strikers in violation of the Act." *Bonnaz Embroideries Tucking, etc., Local 66 (V. & D. Machine Embroidery Co.)*, 134 NLRB 879, 880, citing *International Woodworkers of America et al. (W.T. Smith Lumber Co.)*, 116 NLRB 507, 508, enf'd., 243 F.2d 745 (C.A. 5). See also, e.g., *Local 3, I.B.E.W. (New Power Wire & Electric Corp.)*, 144 NLRB 1089, 1092, enf'd., 340 F.2d 71 (C.A. 2); *Union Nacional de Trabajadores et al. (Surgical Appliances Mfg., Inc.)*, 203 NLRB No. 11.

The record as a whole inevitably leads to the inference that Respondents' course of conduct did seriously interfere with the employees' free exercise of

their statutorily guaranteed rights. It will be recalled that, according to Castro, he learned about the strike on Monday afternoon, from Serrano. No explanation was forthcoming as to why the employees had elected to go on strike as of Tuesday morning to support their demand for improved medical insurance when the Company had already promised that an insurance company representative would talk to the employees on Tuesday. Both Castro and Pereira testified that on Tuesday Castro said that the Union would withdraw if the Company met the employees' demands. Such a commitment by the Union would have been, to say the least, somewhat unusual if the employees had freely executed their membership application and authorization cards. As previously set forth, Castro testified that the employees decided to demand recognition of the Union when "they saw that the company did not want to settle as to the medical plan." But it is not apparent when such alleged "decision" was made. The very earliest it could have been made with any semblance of rationality was Wednesday, when, according to Castro, the Company failed to present the promised detail of an improved medical insurance program. Yet Wednesday afternoon the employees, through a delegation headed by employee Atiles, sought to negotiate an end of the strike. The negotiations were aborted by Serrano's bellicose conduct. Castro also testified that he and Serrano had demanded recognition and bargaining with the Union on Tuesday, the first day of the strike. The evidence as a whole suggests that the apparently premature strike may have been instigated by Serrano in consultation with Castro. In any event, even if the strike was a spontaneous act by the employees, the record leaves no doubt that it was prolonged by Serrano's threatening and coercive conduct.

Respondents maintain that the evidence does not establish that Serrano was acting as an agent of Respondent Union. So far as appears, he was not an officer or a paid employee of the Union. There was not direct evidence

that he was ever formally or expressly appointed as an "agent" of the Union.[9] But that does not dispose of the "agency" issue, under the Act.

Serrano and his brother, Efrain Serrano, had both been working for Catalytic Industrial Maintenance Co. Inc., at a construction project for Merck, Sharpe & Dohme Quimcals de Puerto Rico, Inc. in November and December 1973, when Respondent Union conducted a strike. In an unfair labor practice proceeding against the Union arising out of the Catalytic-Merck strike, it was alleged in the complaint and admitted in the Union's answer that both the Serrano brothers, members of the Catalytic organizing committee, were "agents" of the Union. Cases Nos. 24-CC-168 and 169 and 24-CB 877 and 878, awaiting decision by Administrative Law Judge Sidney D. Goldberg. In the present case, Castro conceded that Serrano had been the Union's "contact" at Catalytic and played the same role at Jacobs.

While at Catalytic, Serrano had acquired a supply of blank Union authorization cards. The evidence is undisputed that he had such cards executed by Jacobs' employees on Tuesday morning, the first day of the strike. But on Monday, the day before, Serrano had informed Castro of the strike. It is inconceivable that Serrano had not at least by Monday afternoon obtained Castro's approval and assurance that the Union would sponsor the strike. It is equally inconceivable that Castro and Serrano failed to agree that Serrano would obtain Union authorization cards from the employees.

Thereafter, throughout the strike, Serrano served as the principal spokesman for the employees. And, as Castro testified, "when you talk for the

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[9] In this connection, on direct examination by Respondents' counsel, Castro testified:

Q. Do you know if Alcides Serrano has ever been named representative, or organizer, or officer of the union?
A. No, he has never been a member of the union in any category.
Q. Did you while being there give Mr. Serrano any authority to act in the name of the union?
A. No, sir.

employees you talk for the union." Additionally, Cruz credibly testified that Serrano informed management representatives that he was a Union agent. Such statements were made in the presence of Castro, who, so far as appears, gave no indication of disagreement.

The evidence as a whole establishes that Serrano was, in effect, the Union "resident agent" at the Jacobs project in Arecibo. As the Union's agent, Serrano directed the course of the strike, under the general guidance of Castro. Castro did nothing to prevent or restrain Serrano's bellicosity. On the contrary, at least on the occasion when Serrano threatened the Quality Control Board's representative and prevented his conferring with management personnel, Castro was present and made no "effort to disassociate the Union's efforts from the threats." *Food Store Employees Union, Local 347 (Davis Wholesale Co.),* 165 NLRB 264, 268. Indeed, as stated above, Castro himself invited Pereira to fight on April 5 and on April 17 threatened to fight anybody who attempted to prevent his talking to Jacobs employees in work areas whenever he chose. In testifying, Castro gave the clear impression that he deemed virtually any conduct, legal or illegal, to be justified to further the employees' and the Union's interests.

On all the evidence, it is concluded that during the strike Serrano was acting as the Union's agent within the meaning of Section 2(13) of the Act. Accordingly, the Union is responsible for his coercive and threatening conduct. Additionally, since he was acting as an agent of the Union, Serrano is personally guilty of violating Section 8(b)(1)(A) of the Act.

On April 17, Castro, clearly acting as an agent of the Union, threatened to fight anybody who attempted to prevent his speaking with the employees whenever he chose. It is thus clear that the Union's pattern of coercive and threatening conduct was a continuing one. It is concluded that on April 17 the Union, through Castro, violated Section 8(b)(1)(A) of the Act.

The evidence also establishes that on April 17 and 19 Serrano threatened and assaulted management representatives within view of other employees. So far as appears, when he threatened Gresh with a hammer and then shoved him, Serrano was reacting to his own discharge rather than specifically furthering the Union's interests. However, the Union filed a charge with the Board concerning Serrano's discharge and there is no suggestion that the Union disapproved or attempted to disassociate itself from Serrano's continued belligerency. Serrano's conduct in that period was apparently condoned by the Union, and part of the continuing general pattern of coercion and restraint.

Conclusions of Law

1. Jacobs Constructors Company of Puerto Rico is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union Nacional de Trabajadores is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Alcides Serrano is an agent of Respondent Union within the meaning of Section 2(13) of the Act.

4. By the acts and conduct described in section II, above, Respondents have restrained and coerced, and are restraining and coercing, employees in the exercise of the rights guaranteed them under Section 7 of the Act and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

The Remedy

Having found that Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, I shall recommend that each Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Charging Party, however, urges that remedial action be required in addition to the customary provisions. In support of its request, the Charging

Party asks that official notice be taken of the following additional proceedings, which allegedly establish the Respondent Union's "proclivity" for violating the Act:

Union Nacional de Trabajadores (Surgical Appliances Mfg. Inc.), supra, 203 NLRB No. 11. Like the present case, that case concerned threats and violence engaged in by the Union and Acosta in November 1972 for the purpose of preventing employees' refusing to participate in a strike. Upon the Respondents' default, the Board on April 23, 1973, issued an order against both the Union and Acosta restraining violations essentially similar to those found in the present case.

Union Nacional de Trabajadores (Construcciones Werl, Inc.), Case Nos. 24-CB-861 and 863 and 24-CC-163. Case No. 24-CB-861 (which had been consolidated with Case No. 24-CC-163) involved the Union's alleged violation of Section 8(d) of the Act by striking without giving statutorily required notices. A temporary restraining order and then, after hearing, a preliminary injunction were granted under Section 10(j) of the Act. D.P.R. Civil No. 746-73. Proceedings were later instituted against Respondent for contempt of the injunction. The Board proceeding was ended by a stipulation and consent order (DS-522) and judgment entered by the United States Court of Appeals for the First Circuit on March 15, 1974 (C.A. 1 No. 74-1066).

Case No. 24-CB-863 involved alleged threats and violence during a strike. This case also was ended by a stipulation and consent order (DS-521) and judgment of enforcement by the Court of Appeals (C.A. 1 No. 74-1054, March 7, 1974).

In referring to these cases, the Charging Party fails to note that the Board Orders enforced by the Courts apparently contain non-admission clauses. The stipulations for settlement set forth the text of the orders which it is agreed that "the Board may enter . . . forthwith." The text of the orders so

prescribed contains a statement that "it is understood that the signing of this Stipulation by the Respondent union does not constitute an admission that it has violated the Act." While the Board Orders (DS-522 and DS-523) do not themselves contain express nonadmission clauses, they do provide that the stipulations are "hereby approved and made a part of the record." Additionally, neither the stipulations nor the orders contain any factual statements or findings that violations have been committed.

Union Nacional de Trabajadores (Catalytic Industrial Maintenance Co., et al.), supra, Cases Nos. 24-CC-168 and 169, and 24-CB-877 and 878. In these cases, the complaint alleged, *inter alia,* violence and threats in the course of a strike commencing on or about November 20, 1973, and continuing until December 1, 1973, when it was restrained and then enjoined by a United States District Court. *Compton v. Union Nacional de Trabajadores,* D.P.R., Civil No. 1060-73. In the Board proceeding, a settlement agreement was reached by the General Counsel and the Respondents. However, upon objection of the Charging Parties, Administrative Law Judge Goldberg rejected the settlement. The case was tried in May 1974 and is now awaiting decision.

Union Nacional de Trabajadores (Macal Container Corp.), Case No. 24-CB-888. The complaint in the *Macal* case alleges numerous threats and acts of violence by Respondent Union and its agents, including Castro, in the course of a strike commencing on April 23, 1974, within a week after Castro is here found to have made threats in the present case. The *Macal* case was heard by Administrative Law Judge Eugene E. Dixon on August 6 and 7, 1974, and is now awaiting decision.

The Board has held that neither injunctions under Section 10(j) nor consent orders and judgments of enforcement pursuant to settlement agreements constitute evidence of a "proclivity" to violate the Act. *Teamsters, Local 70 (C & T Trucking Co.),* 191 NLRB 11. *A fortiori* settlement agreements which,

like those in the *Werl* cases, contain "non-admission" clauses cannot establish a "proclivity." Similarly, under *C & T Trucking*, a "proclivity" on the part of Respondent Union to violate the Act would not be shown by judgments holding it in contempt of a Section 10(j) injunction.

Thus, in the present case we are left with only the *Surgical Appliances Mfg., Inc., supra*, 203 NLRB No. 11, default order against Respondent and the findings in the present case as the basis for finding a "proclivity" on Respondent's part to violate the Act. In *C & T Trucking* the Board held that a broad cease-and-desist order was not appropriate despite "13 settlement agreements, one Board decision, one Trial Examiner's decision to which no exceptions were filed and another which is currently before the Board, a civil and criminal contempt adjudication in one case, and a preliminary injunction in another, all involving the Respondent herein." On the other hand, the Board has found a "proclivity" sufficient to warrant a broad order in at least one case where there was evidence of only one prior violation by the respondent union. *Teamsters, Local 327 (Hartmann Luggage Company)*, 173 NLRB 1403. Although it held the Board's Order insufficiently specific, the Court of Appeals for the Sixth Circuit expressly held that there was sufficient evidence to support the Board's "proclivity" finding. 419 F.2d 1282, 1284.

While *C & T Trucking* reflects a restrictive view and postdates *Hartmann Luggage*, it is distinguishable from the present case in a major respect. In *C & T Trucking* the violations involved were of a different type from those involved in the earlier cases, whereas the violations found in the present case are of the same type as and very similar to those which the Union was found to have committed in the *Surgical Appliances* case. Accordingly, I find that Respondent Union has demonstrated a "proclivity" for engaging in the type of coercive conduct shown in the present case.

In any event, without reference to any other proceedings, the evidence in the case *sub judice* may in itself establish the need for extraordinary

remedies. As recently said in *Local Union No. 69, Sheet Metal Workers (Wind Heating Company)*, 209 NLRB No. 154, slip op. p. 2, n. 2: "The Board has long held that a broad remedial order is appropriate whenever a proclivity to violate the Act is established, either by facts compelled by a particular case . . . or by prior Board Decision against the respondent at bar based upon similar unlawful conduct in the past." In the present hearing Acosta and Castro made it clear that, as agents for the Union, they held the Act and its administration in contempt. For example, Acosta, called as an adverse witness by the General Counsel, proclaimed: "In respect to this the only thing we have to say is that these are fabricated cases and we do not wish to continue with this spectacle." Castro also protested that he "does not recognize the authority of the law or of the Board that administers the law." He testified further:

> The main [function of an organizer for Respondent Union] is to see that the workers' rights are respected, that the laws that are in effect in this country be applied in a manner favorable to the workers and when they cannot be they should be violated.
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> • • • • •
>
> First of all we [Union organizers] explain to [the workers] the unfairness of the Taft-Hartley Law which represents a straight jacket for the workers because it does not permit the normal development of organization; that law represents a whole bureaucratic system which only serves to delay the organization process and permits lawyers like [the Company's attorney] and companies like Jacobs [to] go over the wishes of the majority of the employees in a shop.

And toward the end of the hearing Castro persisted again in making sure "that people will understand that we are here against our will, that we do not

acknowledge any authority of the Board over us." These purely gratuitous protestations, it should be borne in mind, were in lieu of any attempt to provide substantial or significant evidence in defense against the factual allegations of the complaint.

On the basis of the pronouncements and demeanor of Acosta and Castro, I have no hesitancy in concluding that extraordinary remedies are called for to provide any reasonable hope of preventing further violations of the Act by Respondent Union and its various agents, including Respondent Serrano. *Teamsters, Local 85 (West Transportation, Inc.)*, 180 NLRB 709, 717-718. With this in mind, I turn to consideration of the specific remedies requested by the Charging Party.

1. *Reimbursement of the Charging Party's and the General Counsel's Expenses.* As the Charging Party recognizes, it is a "general and well-established principle that litigation expenses are ordinarily not recoverable." *Heck's, Inc.*, 191 NLRB 886, 889, rev'd. in pertinent part *sub nom. Food Store Employees, Local 347 v. N.L.R.B.*, 476 F.2d 546 (C.A. D.C.), remanded U.S. , 86 LRRM 2209. On the other hand, imposition of such costs is proper "in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest." *Tiidee Products, Inc.*, 194 NLRB 1234, 1236.

In view of Respondent's agents' proclaimed refusal to "acknowledge" the "authority" of the Act and the Board that administers it and their position that the law "should be violated" if it conflicts with the Union's view as to the best interests of the "workers," there is ample reason to believe that only a substantial and immediate monetary burden will serve to deter further resort to violence and threats of violence to impose the Union's will on employees and employers alike. Thus, it may well be said that assessment of such costs is clearly necessary to effectuate the policies of the Act and serve the public interest.

There is, however, serious question as to whether Respondents' litigating this case may be termed "frivolous" within the *Tiidee* decision. Respondents' failure to present any substantial defense and Respondent Serrano's unexplained failure to testify certainly suggest that Respondents were not litigating in good faith. Acosta's and Castro's statements strongly reinforce this impression. On the other hand, respondents generally have the right to require that the General Counsel be put to his proof initially. And, despite Respondents' failure to present any evidence contradicting the plethora of evidence against Serrano, there was some plausible basis for Respondents' argument that he was not an "agent" of the Union. Accordingly, while the matter is not entirely free from doubt, it is concluded that in the present case it would not be appropriate at this time to depart from the general rule against assessment of the costs of litigation.[10]

2. *A broad order.* While loudly proclaiming great concern for the plight of workers, the Union, through its agents, has resorted to brute force and threats of violence to deprive employees of the freedoms which the Act is designed to protect. As set forth, Castro stated the Union's position that laws "should be violated" when they cannot be applied in the way the Union believes is "favorable to the workers." And the Union's conduct in the present case[11] makes it clear that the Union does not consider as "favorable to the workers" any application of the law which permits them to choose not to honor a strike supported by Respondent Union. The present record, therefore,

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10 No opinion is here expressed as to whether such remedy would be appropriate if the litigation were to be further extended. Presumably the Board will be at liberty to impose such a requirement at a later stage of the proceedings (*Union de Tronquistas de Puerto Rico, etc. (F.F. Instrument Corporation)*, 210 NLRB No. 153, slip op. p. 4), particularly if the pending *Catalytic* and *Macal* cases should result in orders against the Union and thus establish a broader "pattern of repeated unlawful actions." *Orion Corp.*, 210 NLRB No. 71, slip op. p. 6.

11 As well as in the *Surgical Appliances* case, *supra*, 203 NLRB No. 11.

provides strong reason for fearing or predicting that Respondent will embark upon a similar course of strong-arm tactics to enforce any strike it might call at any time in the future. Accordingly, a broad cease-and-desist order is here appropriate. See, e.g., *N.L.R.B. v. Teamsters, Local 327 (Hartmann Luggage Co.)*, 419 F.2d 1282, 1884 (C.A. 6); *N.L.R.B. v. Operating Engineers (Cafasso Lathing & Plastering, Inc.)*, 377 F.2d 528 (C.A. 2). As suggested by the Charging Party, the order will be limited geographically to Puerto Rico.

3. *Lost Wages.* The Charging Party requests that Respondents be required to make compensation for wages lost by employees "who were prevented from entering to work because of the Respondents' violent conduct."

It is perhaps sufficient here to point out, as the Charging Party apparently recognizes, that to date the Board has declined to grant any such remedy in strike violence cases. *Union de Tronquistas de Puerto Rico, etc. (Lock Joint Pipe & Co. of Puerto Rico)*, 202 NLRB 43. Contrary to the Charging Party's contention, I understand *Lock Joint* as totally rejecting a backpay remedy in cases like this. Being bound by Board rulings, I have no authority to consider the Charging Party's arguments in favor of reconsidering the *Lock Joint* rule.[12]

As already indicated, I find that effectuation of the policies of the Act requires that special measures be taken to assure employees of their freedom to refrain from supporting the Union if they so desire. See *Union de Tronquistas de Puerto Rico, etc. (F.F. Instrument Corporation), supra*, 210 No. 153, slip op. pp. 4-5 and cases there cited. The fundamental condition for the protection of employee rights is the employees' knowledge of those rights. The individual employees must have assurance that their guaranteed freedoms will be protected against incursions by unions as well as by employers. In the circumstances of the present case, involving a small project in a somewhat isolated location, it appears necessary that notice be sent to each individual

[12] No opinion is here expressed as to whether there is sufficient probative evidence to warrant a finding that any employees did lose any wages as a result of the Union's restraint or coercion. Cf. *Union de Tronquistas de Puerto Rico, etc. (F.F. Instrument Corporation), supra*, 210 NLRB No. 153, slip op. p. 5.

employee. And, since Jacobs apparently operates numerous relatively small projects, it appears wise, as a preventive measure, to require that all Jacobs' employees be given appropriate assurance that their rights will be protected. Accordingly, I shall recommend that Respondents be required to send copies of the prescribed notice to all employees of Jacobs Constructors in Puerto Rico.

As is customary, I shall also recommend that Respondents be required to provide copies of the prescribed notice for posting by Jacobs. Additionally, since it has been found that Respondents are likely to engage in similar misconduct with respect to other employees, I shall provide that sufficient copies of the notice be made available to the Regional Director to furnish to other employers if and when it should appear that Respondent Union is engaging in or about to engage in similar activity with respect to the employees of such other employers.

Upon the basis of the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[13]

ORDER

Respondent Union Nacional de Trabajadores, its officers, agents and representatives, and Respondent Alcies Serrano, while acting as agent of said Respondent Union Nacional de Trabajadores, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Jacobs Constructors Company of Puerto Rico, or the employees of any other employer in Puerto Rico, from engaging in their employment or exercising their rights under Section 7

[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

of the National Labor Relations Act, as amended, particularly by the use of force or violence or threats of force or violence upon the person or property of any employees, employers or representatives of employers or third persons dealing with or attempting to deal with any employer.

(b) In any other manner restraining or coercing employees of Jacobs Constructors Company of Puerto Rico, or the employees of any other employer in Puerto Rico, in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Post at conspicuous places in its business office, meeting hall and any other places where notices to members of the Union are customarily posted copies in English and Spanish of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative of the Respondent Union and by Respondent Serrano, shall be posted immediately by the Respondent Union and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondents to assure that said notices are not altered, defaced or covered by any other material.

(b) Deliver to the Regional Director for Region 24 sufficient signed copies of said notice in Spanish and English for posting by Jacobs Constructors of Puerto Rico at all locations where notices to employees of the Company are customarily posted, if the Company is willing to post them, and for

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[14] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

posting by such other willing employers as the Regional Director for Region 24 may deem advisable.

(c) Mail copies of said signed notice in English and Spanish to each employee in Puerto Rico of Jacobs Constructors Company of Puerto Rico.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of receipt of this Decision what steps the Respondent have taken to comply herewith.

Dated at Washington, D.C., September 26, 1974.

/s/ Josephine H. Klein
Josephine H. Klein
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had the opportunity to present their evidence, it has been found that we, UNION NACIONAL DE TRABAJADORES DE PUERTO RICO and ALCIDES SERRANO, acting as agent for the Union, have violated the law and we have been required to execute this notice. We are committed to abide by the following statements:

WE WILL NOT engage in any violence or threaten to injure or damage the person or property of any employee or representative of Jacobs Constructors Company of Puerto Rico or

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan Am Building – 7th Floor, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00917 (Tel. No. 106 for PR FTS operator 622-0225)

of any other employer in Puerto Rico or any other person for the purpose of preventing any employees from freely exercising their right not to participate in any strike or their right to refrain from engaging in any concerted activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce any employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

ALCIDES SERRANO, Agent for Union
Nacional de Trabajadores of Puerto Rico

Dated _____ _____

UNION NACIONAL de TRABAJADORES
OF PUERTO RICO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

_____

[July 23, 1975]

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DECISION AND ORDER

On September 26, 1974, Administrative Law Judge Josephine H. Klein issued the attached Decision in this proceeding. Thereafter, Respondent Union, Charging Party, and the General Counsel all filed exceptions and supporting briefs.[1]

[1] The request for oral argument by the Respondents is hereby denied as the record and briefs adequately present the issues and positions of the parties.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge.

ORDER[3]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Union Nacional de Trabajadores, its officers, agents, and representatives, and Respondent Alcides Serrano, while acting as agent of Respondent Union Nacional de Trabajadores, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Jacobs Constructors Company of Puerto Rico, or the employees of any other employer in Puerto Rico, from engaging in their employment or exercising their rights under Section 7 of the National Labor Relations Act, as amended, particularly by the use of force or violence or threats of force or violence upon the person or property of any employees, employers or representatives of employers, or third persons dealing with or attempting to deal with any employer.

(b) In any other manner interfering with, restraining, or coercing, employees of Jacobs Constructors Company of Puerto Rico, or the employees of

[2] The Respondent Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing her findings.

[3] As in the companion cases, issued this day, involving Respondent Union—*Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga de Catalytic (Catalytic Industrial Maintenance Co., Inc.)*, 219 NLRB No. 66, and *Union Nacional de Trabajadores and its Agent Arturo Grant (Macal Container Corporation)*, 219 NLRB No. 67—where unlawful conduct was engaged in similar to that found herein, we shall modify the Order recommended by the Administrative Law Judge in order to better effectuate the policies of the Act and serve the public interest.

any other employer in Puerto Rico, in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Post at Respondent Union's business office and meeting hall copies in English and Spanish of the attached notice marked "Appendix."[4] Copies of said notice on forms provided by the Regional Director for Region 24, after being duly signed by Respondent Union's authorized representative, and by Respondent Serrano, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forthwith mail copies of said notice in English and in Spanish, to the said Regional Director, after said copies have been signed as provided above, for mailing of said notice by the Regional Director to each employee in Puerto Rico of Jacobs Constructors Company of Puerto Rico, and to Jacobs Constructors Company of Puerto Rico, for posting by it, if willing, at its various locations in places where notices to employees are customarily posted.

(c) Publish said notice, at Respondent Union's expense, in all newspapers of general distribution published in Puerto Rico, and in any newspaper of Respondent Union, in each case in the language in which the newspaper is printed.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C., July 23, 1975

Betty Southard Murphy,	Chairman
John H. Fanning,	Member
Howard Jenkins, Jr.,	Member
John A. Penello,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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MEMBER KENNEDY, dissenting in part:

For the reasons fully stated in my dissenting opinion in *Catalytic Industrial Maintenance Co., Inc.*, 219 NLRB No. 66, issued this date, I dissent from my colleagues' refusal to award backpay to those employees who were prevented from working by Respondents' unlawful restraint and coercion.

As in *Catalytic* and *Macal Container Corporation*, 219 NLRB No. 67, also issued this date, agents of Respondent Nacional, particularly Respondent Alcides Serrano, threatened company officials, employees, suppliers, and others with physical harm if they attempted to undermine the strike effort. In addition, when some of the striking employees sought to negotiate an end to the dispute, Alcides Serrano quickly squelched the effort and then proceeded to police his decision with a "gang" of 8-12 pipe- and stick-wielding nonemployees. According to the undisputed testimony, Serrano announced to the employees that he had brought "the gang with [him] to back [him] up so that no one will go to work."

For the reasons stated in my *Catalytic* dissent, I would award backpay for wages lost on account of Respondents' unlawful conduct.

Dated, Washington, D.C., July 23, 1975.

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

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APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had the opportunity to present their evidence, it has been found that we, Union Nacional de Trabajadores de Puerto Rico, and Alcides Serrano, acting as agent for the Union, have violated the law and we have been required to execute this notice. We are committed to abide by the following statements:

WE WILL NOT engage in any violence or threaten to injure or damage the person or property of any employee or representative of Jacobs Constructors Company of Puerto Rico or of any other employer in Puerto Rico or any other person for the purpose of preventing any employees from freely exercising their right not to participate in any strike or their right to refrain from engaging in any concerted activity.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan Am Building, Seventh Floor, 255 Ponce de Leon Avenue Hato Rey, Puerto Rico 00917, Telephone 809-622-0247.

WE WILL NOT in any other manner interfere with, restrain, or coerce any employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

UNION NACIONAL DE TRABAJADORES OF PUERTO RICO

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

Dated _____ By _____
(Alcides Serrano) (Agent)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

UNION NACIONAL DE TRABAJADORES
AND COMITE ORGANIZADOR OBREROS
EN HUELGA DE CATALYTIC,
Respondent

and

CATALYTIC INDUSTRIAL
MAINTENANCE CO., INC.,
Charging Party

Cases 24-CC-168 and
24-CB-877

UNION NACIONAL DE TRABAJADORES,
Respondent

and

MERCK, SHARPE & DOHME QUIMICAS
DE PUERTO RICO, INC.,
Charging Party

Cases 24-CC-169 and
24-CB-878

September 30, 1974

DECISION

SIDNEY D. GOLDBERG, Administrative Law Judge: This case involves allegations of unlawful picketing, violence, and threats of violence.

The complaint herein,[1] pursuant to Section 10(b) of the National Labor Relations Act, as amended (the Act), alleges that Union Nacional de Trabajadores (the union) and Comite Organizador Obreros en Huelga de Catalytic (the committee) are labor organizations; that through named agents, in the course of a strike against Catalytic Industrial Maintenance Co., Inc. (Catalytic), they conducted mass picketing at the premises of Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc. (Merck); that they engaged in violence and threats of violence; and that they engaged in said picketing and violence to force Merck to cease doing business with Catalytic and to force Catalytic to recognize the union as the representative of its employees although not certified as such representative.

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[1] Issued January 2, 1974, on charges filed November 26 and 28, 1973.

Respondents answered, admitting that the named persons were their agents, but denying that they had engaged in violence or unlawful picketing.

The issues so raised came on for trial before me on January 29, 1974, at Hato Rey, Puerto Rico. All parties were represented and the trial opened with the presentation of the case of the General Counsel. At the opening of the second day of the trial, the General Counsel announced that a settlement in principle had been reached with the attorney for the respondents. The proposed settlement was reduced to writing; it provided for the entry of a Board order directing respondents to cease and desist from activities which were described in detail and were similar to the activities alleged in the complaint as constituting unfair labor practices under Sections 8(b)(1)(A) and 8(b)(4)(i) and (ii)(B) of the Act. It also provided for the entry, without notice to respondents, of a court decree enforcing the said Board order.

The charging parties objected to the proposed settlement; they stated that respondents had violated the temporary restraining order issued by the United States district court and had announced that they would ignore Board orders. An evidentiary hearing was held on the matter in which all parties participated. At the close of that hearing I denied the application for approval of the proposed settlement and directed that the trial of the case proceed. The General Counsel applied to the Board for leave to appeal from that ruling and the Board, by telegraphic order dated February 6, granted the General Counsel an appeal from my refusal to postpone the hearing. It directed that the hearing be postponed indefinitely pending the Board's consideration of the proposed settlement agreement. This directive was effected.

By order dated April 4, 1974, the Board held that my ruling not to approve the proposed settlement stipulation and to direct that the hearing of the issues be resumed on the merits was a proper exercise of discretion; that it should be, and it was, affirmed. The Board also ordered that the record be

reopened for further hearing before me, and, by order of the Regional Director dated April 11, the case was set for such further hearing on May 22, 1974. That order was duly served on the respondent Union Nacional and its counsel.

On May 22, pursuant to the order of the Regional Director, the case was called for hearing. The General Counsel and counsel for the charging parties were present but no representative of, or counsel for, either of the respondents was present. The counsel present were directed to communicate with respondents' officials and their counsel; they reported that they had talked with both Arturo Grant, president of respondent Union Nacional, and with counsel for respondents, and that they had both stated that they were otherwise occupied and could not appear in this case.

The taking of evidence on the issues thereupon proceeded on May 22, 23, and 24. At the end of each day, counsel were directed to make all possible efforts to communicate with respondents and their counsel, to inform them that the taking of evidence was proceeding and that, if respondents desired to participate, they should have a representative present. Each day, participating counsel reported the results of their efforts. On May 24, the General Counsel received a telegram from Grant which stated that representatives of Union Nacional could not appear and that it could not communicate with its counsel so that he could appear. On May 24, the record was completed to the satisfaction of the General Counsel and counsel for the charging parties. The General Counsel was directed to write letters to respondent Union Nacional and its counsel, informing them that the record had been completed; that the General Counsel and counsel for the charging parties had been given until June 19, 1974, to submit proposed findings, conclusions, and orders; that copies of all documents so submitted would be served on them; and that they had been given until June 28, 1974, to submit objections or cross-findings.

Thereafter, on June 19 and July 8, 1974, counsel for the charging parties filed proposed findings of fact, conclusions of law, and an order, together with

a brief in support thereof, with proof of due service thereof on the General Counsel, on respondents, and on their counsel. The General Counsel has not submitted a brief and no documents of any kind have been submitted by respondents or their counsel.

The evidence adduced by the General Counsel and the charging parties was not contradicted or controverted by respondents. The undisputed evidence supports the allegations of the complaint and I find that respondents, by their conduct, violated Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii)(B) of the Act.

Upon the entire record herein,[2] I make the following:

Findings of Fact

1. Merck is a Puerto Rico corporation engaged in the manufacture of chemical and related products at its plant in Barceloneta, Puerto Rico. In the operation of its business it annually purchases materials directly from sources outside Puerto Rico valued in excess of $50,000 and its direct sales outside of Puerto Rico annually exceed $50,000. At all times material herein Merck has been, and is, an employer engaged in commerce.

2. Catalytic is a Delaware corporation engaged in the performance of construction work in several States. It has been engaged in such work for Merck on the latter's above-described premises and is an employer engaged in commerce.

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[2] During the argument and the evidentiary hearing concerning the proposed settlement, respondents were represented by their counsel but, because of the limited nature of the issue involved, I placed some limitations on the extent of cross-examination of the witnesses presented. To counterbalance this restriction, I announced that the testimony taken during the evidentiary hearing would not be considered in determining the issues on their merits if the proposed settlement should be rejected and the case carried to decision. Accordingly, in the formulation of this decision, no consideration has been given to the testimony of the 11 witnesses presented on February 5. The only exhibits presented that day, however, are Board actions of which official notice is taken and they are entiled to consideration without the stated limitation.

3. Juan Hernandez, Inc. (Hernandez), Chase Overseas, Inc. (Chase), and Industries Freight (Industries) are independent trucking firms engaged in contract hauling of cargo and other material to and from Merck and other persons engaged in commerce.

4. Union Nacional de Trabajadores, herein called the union, is, and has been at all times material herein, a labor organization.

5. Comite Organizador Obreros en Huelga de Catalytic, which, translated into English, is Organizing Committee of Workers on Strike at Catalytic and is herein called the committee, was at the times materia! herein a labor organization.

6. At no time material herein was either the union or the committee recognized or certified as the collective-bargaining representative of the employees of either Catalytic or Merck.

7. The following named persons are members of the committee and officers of the union and acted as their agents herein:

Arturo Grant Padro	Union President
Radames Acosta Cepeda	Union Secretary-Treasurer
Carlos Rodriguez	Union Organizer
Vicente Gonzalez	Committee Member
Efrain Serrano	Committee Member
Alcides Serrano	Committee Member
Julio Denis	Committee Member

8. The premises of Merck involved herein consists of a track of land containing approximately 115 acres, bounded on the north by Highway No. 2 and on the west by a public highway leading to the main entrance of Merck, as well as the premises of other persons. The distance from the main entrance of Merck on the public road to the Merck plant and the portion of the premises where Catalytic was performing its construction work is about half a

mile. There is a paved road leading from that entrance to the Merck plant and the parking areas adjacent to the plant.

9. At the times material herein and for the purpose of carrying on the construction work on a part of Merck's premises, separate entrances were provided for the employees of Merck and of Catalytic, respectively, and separate areas were provided for the parking of their automobiles.

10. Beginning November 20, 1973,[3] the committee, through its members, and the union, through its agents and employees of Catalytic, engaged in a strike against Catalytic.

11. At no time material herein were respondents, or either of them, engaged in a labor dispute with Merck, Hernandez, Chase, or Industries.

12. On November 21, the union began picketing in front of the gate reserved for Merck employees.

13. On Friday, November 23, about 5:30 a.m., respondents, by their agent Efrain Serrano, stated over loudspeakers outside the Merck plant that neither Merck nor Catalytic employees, and no vehicles, would be permitted to enter or leave the Merck plant.

14. On November 23, the union, during its picketing at the entrance reserved for Merck employees, threatened to "damage" a security guard of Merck if he became "involved" with them.

15. On November 23, a truck from Chase, which removes liquid waste from Merck on a daily basis, was stopped on the entrance road into the Merck plant by a group of strikers including respondent's agent Carlos Rodriguez and they refused to allow the truck to enter Merck's premises.

16. On November 23, an employee of Hernandez attempted to deliver a tank of ammonia to Merck and was detained and blocked by 25 pickets at the

[3] All dates hereafter, not otherwise designated, are 1973.

entrance to Merck's premises; respondents' agent Carlos Rodriguez, in the presence of Radames Acosta, the union's secretary-treasurer, told the Hernandez employee that he would not be permitted to enter Merck's premises and that, if he attempted to enter, it would be on his own responsibility; that, by reason of such threats and intimidation, the employee of Hernandez was forced to, and did, abandon the truck outside the Merck plant, although he informed respondents' agents that the truck carried a dangerous cargo. On the afternoon of that day respondents' agents stated, over their loudspeaker, that neither the tank of ammonia nor any other vehicle would be permitted to enter the Merck plant.

17. On November 23, an employee of Chase was permitted to leave Merck's premises with a truckload, but was physically blocked from reentering the plant, and was detained by a group of pickets at the entrance to Merck's premises. The employee of Chase informed the pickets that he was there to service Merck; they responded that they were not letting any vehicle go into the plant, regardless of whether it was servicing Merck or Catalytic because their pressure on Merck would compel Merck to exert pressure on Catalytic to resolve its problems with the union, and the truck was not allowed to enter Merck's premises.

18. On each working day between November 23 and December 3, employees of Chase attempted to enter Merck's premises, but were not permitted to do so by the pickets; during this period vehicles of Chase were struck by rocks as they attempted to enter the Merck plant and as they entered and left other plants which they serviced in the immediate area.

19. On November 23, Julio Denis, member of the committee, threatened a Merck employee, in the presence of Carlos Rodriguez, a union organizer, with a beating "if he interfered with them," referring to the pickets.

20. On the morning of November 24, the plant manager of Merck, in the presence of respondents' agent Carlos Rodriguez, informed the pickets that

Merck was not involved in the labor dispute which the strikers had with Catalytic and that the ammonia truck had to be removed to a safe area since it was volatile and explosive. The strikers responded by stating that they were not going to permit anyone to enter the plant even though they knew it was illegal for them to do so. Later that same day the plant manager again requested that the pickets permit the ammonia truck to be stored in a safe area and again the strikers, in the presence of respondents' agents Carlos Rodriguez, Efrain Serrano, and Alcides Serrano, refused to do so, again stating that no one was to enter the plant. Not until 4 a.m. on November 26 was the ammonia truck moved by a Merck employee, under police escort, to an area within the plant premises.

21. On the evening of November 25, Julio Denis stated over the loudspeaker at the Merck plant that the ammonia trailer might explode.

22. During this same period, Efrain Serrano threatened to bomb Merck's water wells, which are located outside the company fence.

23. Efrain Serrano also stated over the loudspeakers that the light and electric power might go out and thereafter the lights did go out by reason of a short circuit caused by a steel chain that was thrown over the high voltage line inside the Merck property.

24. On November 26, after the ammonia truck had been brought inside the plant premises, respondents, through Efrain Serrano and in the presence of Carlos Rodriguez, stated over the loudspeakers that "they were going to get Mr. Ashby [the plant manager] and kill him as soon as they saw him in the street." Serrano also stated that the driver of the ammonia truck should be careful of his own personal safety.

25. On November 24, at approximately 10 a.m., an employee of Industries arrived at the Merck premises to deliver a tank of acid; he was stopped at the plant entrance by a group of about 15 persons who informed him that

they were on strike and that he could not go into the plant. The pickets forced the driver to leave the truck parked at the picket line and only under picket escort was he permitted to enter the Merck offices to communicate with his superiors. Upon returning to the truck, he found it impossible to enter the Merck premises by reason of mass blocking by the pickets and he returned the truck to his employer's place of business.

26. On or about November 24, the truck of an employer, attempting to deliver food to Merck's cafeteria, was blocked at the entrance of the plant by a group of pickets, and was not permitted to enter.

27. On or about November 24, the truck of an employer, attempting to make a delivery of milk to Merck's cafeteria, was blocked at entrance of the plant by a group of pickets, and was not permitted to enter.

28. On November 25, respondents, through Efrain Serrano, stated over the loudspeakers at the Merck plant that no one was going to be permitted to enter the Merck plant on the next day. By reason of this statement, those employees who were in the plant on November 25 were compelled to remain inside.

29. On November 26, at approximately 6 a.m., respondents, through Radames Acosta, secretary-treasurer of the union, and in the presence of Efrain Serrano and Alcides Serrano, members of the committee, stated that the employees of Catalytic should join the union, and they should not be afraid because Union Nacional had already disregarded and violated an injunction.

30. On November 26, respondents, through their agents set forth above, immediately following the foregoing statements, announced over the loudspeakers that the Merck employees were not going to be permitted to enter the plant the following day.

31. On November 26, at 6 a.m., the Merck employees attempting to report for the first shift, in the presence of respondents' agents Radames Acosta,

Efrain Serrano, and Alcides Serrano, were detained and surrounded by a group consisting of more than 20 pickets on the road leading to the Merck plant and they were prevented from entering Merck's premises. Efrain Serrano stated several times, over the loudspeakers, that he was not going to let anyone to go inside the plant. At the same time, a group of pickets, in the presence of Radames Acosta, threw sticks and other objects at one of the cars attempting to enter Merck's premises and, as a result, approximately nine vehicles were forced to turn away by strikers blocking their entrance to Merck's premises.

32. On November 26, after they had prevented Merck's first-shift employees from entering its plant, respondents, through about 50 pickets, including Arturo Grant and Carlos Rodriguez, prevented the second and third shift of Merck's employees from entering the plant by similar mass blocking of the entrance road and by their threatening statements over the union's loudspeakers that no one would be permitted to enter the plant.

33. By reason of respondent's conduct set forth above, approximately 39 Merck employees were forced to stay inside the Merck plant during the entire period that the picketing continued, and makeshift living accommodations had to be furnished and made available for these employees inside the Merck plant.

34. During the period that Merck employees were compelled by respondents' activities to remain inside the Merck plant, wives were permitted by the pickets to enter to see their husbands only when escorted by one of the pickets.

35. On November 26, about 9 p.m., Victor Charron, personnel manager for Merck, while attempting to enter the plant was stopped by a group of more than 25 pickets, including Efrain Serrano, Alcides Serrano, and Radames Acosta, who hit and kicked the car he was riding in, and said Merck employee was prevented from entering the plant until the police intervened.

36. On November 26, respondents' agent Efrain Serrano, speaking over the loudspeakers at the Merck plant, addressed Victor Charron, Merck's personnel manager, saying, "I'll cut you in Barceloneta."

37. On November 27, Radames Acosta, secretary-treasurer of the Union, stated over the loudspeakers that Catalytic was attempting to obtain an injunction, but that the unions were not going to obey such injunction, as they had refused to obey other injunctions in the past, and that the union was ready to go to jail.

38. On November 26, 27, and 28, announcements were made over respondents' loudspeakers that the Merck employees inside the Merck plant would not be permitted to leave and that bodily harm would be inflicted upon those employees who would not cooperate with the strike.

39. On November 26 and 28, a group of about 30 pickets at the entrance of Merck's premises blocked the car driven by Martinez Robles, a maintenance mechanic for Merck, and prevented him from entering Merck's premises. Martinez informed Efrain Serrano that he did not work for Catalytic, and asked why was he being stopped. Serrano replied that by detaining the employees of Merck he could help solve the problem that they had with Catalytic.

40. On November 27, a group of Merck female secretaries, while attempting to enter the plant as a group, were detained at the entrance to Merck's premises by a group of about 20 to 25 pickets who surrounded their car and struck it repeatedly.

41. On November 27, Ted Crowder, area superintendent for Catalytic, was surrounded at the entrance of Merck's premises by a group of 25 to 30 pickets, including agents of the respondents, who struck his car and refused to let him enter.

42. On November 27, Cristobal Solis, utility supervisor for Merck, attempted to enter Merck's premises; two men stepped in front of his car,

physically blocking his entrance to the plant. A group of 25 pickets surrounded his car and one of them told Solis that he could not go in. During this conversation, one of the pickets punched Solis in the jaw.

43. On November 27, Jose Cintron, safety engineer for Merck, accompanied by one Sarkis, another Merck employee, attempted to enter Merck's premises with supplies and provisions for the Merck employees who were remaining inside the plant. A group of pickets, including agents of respondents, physically blocked and stopped them at the entrance and prevented them from entering the premises. While the vehicle was stopped, the pickets, including agents of respondent, continuously struck the car. When one of the pickets attempted to open the rear door of the car and was prevented from doing so by Cintron, Rodriguez, an agent of respondents, struck Cintron. Police intervention was required in order to permit the vehicle to enter the premises.

44. On November 27, respondents' agent Alcides Serrano and a group of pickets blocked the road inside Merck's premises, between the entrance from the highway and the plant, with two cars and prevented Merck's employees from entering the plant.

45. On November 28, respondents' agent Efrain Serrano, speaking over a loudspeaker, threatened to beat Pedro Reyes, production supervisor for Merck.

46. On November 27 and 28, Sam R. Ambrose, mechanical superintendent for Catalytic, was confronted by 25 to 30 pickets, including agents of respondents, on Merck's premises; they surrounded his car and struck it; they also threatened him and his family with a beating if he went in.

47. On November 28, the pickets stated, over the union's loudspeakers, that they were going to blow up the Merck plant with all the employees in it.

48. On November 28, Ted Crowder, area superintendent for Catalytic, again attempted to enter the Merck premises but was blocked by pickets until

he was able to obtain police intervention. This was repeated on a daily basis for the duration of respondents' activities.

49. On November 28, Pacheco Sanchez, a Merck employee, was stopped by a group of 20 to 25 pickets as he attempted to leave the plant and was told that he would not be allowed to reenter the plant. When Pacheco attempted to reenter the Merck plant later that same day, he was stopped at the entrance to the premises by a group of 30 to 40 pickets, including agents of respondents, who refused to allow him to enter. The pickets surrounded his car and respondents' agent Rodriguez, with a group of six or seven other pickets, attempted to lift the front of the Volkswagen driven by Pacheco. It was not until the police intervened that Pacheco was able to enter the plant premises.

50. On November 28, as Pacheco Sanchez, a Merck employee, was entering Merck's parking lot, respondents' agent Efrain Serrano, shouted that he would get him at his home. The following day, Serrano told Pacheco that he was going to give him a beating.

51. On December 1, upon the petition of Raymond J. Compton, Regional Director of the National Labor Relations Board, and after oral notice of the application to counsel for respondent, the United States District Court for the District of Puerto Rico issued a temporary restraining order, enjoining and restraining respondents from any acts or conduct that would induce or encourage any employee of Merck, Hernandez, Chase, Industries, or any other person engaged in commerce, to engage in a strike or refusal in the course of his employment, to use, process, transport, handle, or work on any goods, materials, or commodities or to refuse to perform any service, or by any means threatening, coercing, or restraining Merck, Hernandez, Chase, Industries, or any other person engaged in commerce, where an object thereof was (1) to force or require Merck, or any other person, to cease doing business with Catalytic;

or (2) to force or require Catalytic to recognize or bargain with respondents, unless or until respondents have been certified as the representative of such employees under the provisions of Section 8 of the Act. The said temporary restraining order was thereafter duly served on agents of respondents on December 2, 1973.

52. On December 3, a group of 25 to 30 pickets stopped Samuel Santiago, a Merck employee, as he entered Merck's premises from the public highway; one of them struck his car and pushed him.

53. On December 3, Samuel Santiago, a Merck employee, attempted to enter the Merck premises by an access road; as he drove on said road, two men threw rocks at his car.

54. On December 3, Manuel Laguna, a forklift operator for Merck, attempted to enter the plant by the access road but was stopped by four men, including an agent of respondents, who blocked the road. As Laguna turned his car around, these four men threw stones at him.

55. On December 4, Acosta, secretary-treasurer of the union, and Efrain Serrano and Alcides Serrano, members of the committee, blocked the main entrance road leading to the plant with a car.

56. On December 4, Acosta, secretary-treasurer of the union, threw a stone at the station wagon driven by Jack Treathaway, project superintendent for Catalytic, at the intersection of two public highways bordering Merck's premises, as he was attempting to enter.

57. On December 5, nonstriking Catalytic employees formed a caravan of cars to enter the construction jobsite. On the public highway, about 1/4 of a mile from another public highway leading to the plant entrance, they were confronted by 5 cars carrying pickets, including agents of respondents, who were armed with clubs and other weapons; respondents' agents approached one of the cars that contained a number of Catalytic employees and began pound-

ing on the car. Respondent's agent Alcides Serrano then hit Urbiztondo, general foreman for Catalytic; employees of Catalytic left their cars and lined up on the other side of the road, creating a serious confrontation between the two groups, and violence was averted only by police intervention.

58. On December 5, about 9 a.m., Alcides Serrano threatened Ismael Rodriguez, a Catalytic employee, with a knife and demanded to know why he had gone to work that day; Efrain Serrano threatened to hit Ismael Rodriguez with a hammer; and Julio Denis pushed Ismael Rodriguez and started a fight with him.

59. Throughout the period of their activity, respondents made threats, over the union's loudspeakers, that they would harm Jorge Medina, Merck's security chief, and his family.

60. During the period set forth herein, the picketing by respondents covered every possible entrance to the property owned by Merck and all the entrances to its plant.

61. The activities of respondents, set forth in findings of fact numbered 12 through 50, and 52 through 60, occurring in connection with the operations of Merck, Catalytic, and other employers, as set forth in findings of fact numbered 1, 2, 3, and 8, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

The General Counsel has submitted no suggestions concerning the remedy he considers appropriate in these cases. The charging parties, however, have made specific requests. They urge that the order to be recommended herein provide:

(a) Reimbursement to the National Labor Relations Board and the charging parties for their expenses in the preparation and presentation of the allegations of unfair labor practices in these cases.

(b) A broad order prohibiting repetition by the union of the conduct found violative herein, directed against any employer or person in Puerto Rico.

(c) Execution by respondents of a sufficient number of copies of the notice to be prescribed herein for mailing to all employees of the charging parties in Puerto Rico.

(d) A notice to members in understandable language which will clearly remedy the rights violated by respondents.

(e) Reimbursement to the employees of the charging parties who were prevented from working during the strike by the conduct of respondents found violative of the Act.

Notwithstanding respondents' failure to participate in this case after the rejection of the proposed settlement and despite the absence of objections to the charging parties' remedial proposals, the order to be recommended herein will be formulated with due regard for the established principles governing such orders.

(a) Reimbursement to the Board and charging parties for expenses in prosecuting this case

It may be assumed that the Board has authority to assess against a respondent the costs of litigation in an appropriate case, as was done in *Tiidee Products, Inc.*, 194 NLRB 1234 (1972) - albeit pursuant to direction by the court of appeals - and apparently approved in principle by the Supreme Court in *N.L.R.B. v. Food Store Employees Union, Local 347 etc. [Heck's Inc.]*, U.S. , 94 S.Ct. 2074 (May 20, 1974).

The basis of the award of counsel fees and expenses to the Board and the union in *Tiidee*, however, was respondent's interposition of frivolous defenses and tactics of delay in the litigation itself, as contrasted with its activities giving rise to the litigation.[4] In two recent cases the Board considered

[4] In cases like *Tiidee*, involving refusals to bargain, there may be an overlapping of these two types of activity.

applications for similar awards of litigation expenses and, in both cases, denied them.

Orion Corporation, 210 NLRB No. 71 (1974), involved a refusal to bargain with a certified union; the company's position was that its withdrawal of recognition was based upon a belief that "the union no longer represented a majority of employees." This defense was litigated and rejected, by both the Administrative Law Judge and the Board, as having "no reasonable basis." The recommendation of the Administrative Law Judge that the charging union be reimbursed its expenses, including counsel fees and its expenses in attending bargaining sessions, however, was reversed, the Board stating that:

> . . . Respondent's conduct, although serious, is not so aggravated and pervasive, or its defense so frivolous, as to warrant this special additional remedy.

Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (F.F. Instrument Corporation), 210 NLRB No. 153 (1974), like the case at bar, involved threats and violence in violation of Section 8(b)(1)(A) and activities, violent and otherwise, in violation of Section 8(b)(4)(i) and (ii)(B). To allegations of violation of both sections, respondents interposed the defense that F.F. Instrument was an "ally" of the company with which it had its primary dispute. With respect to the 8(b)(1)(A) violation, the defense was stricken on motion and, in support of that defense to the 8(b)(4) violation, respondent introduced no evidence at all. The Administrative Law Judge declined to recommend that the charging party be reimbursed for its expenses and the Board affirmed, stating that:

> We have only awarded such cost reimbursement remedy in limited circumstances where frivolous defenses were raised by a litigious Respondent strictly to delay or avoid its obligations under the Act.

> See, e.g., *Tidee Products, Inc.*, 194 NLRB 1234 . . . . we are not willing to find that Respondent's contesting this matter through to a decision of an Administrative Law Judge should be construed as wholly frivolous.

It warned, however, that "any further litigation in this case would constitute an abuse of the processes of the Board and the courts."

Respondents' answer in this case consisted solely of a general denial; they participated in the first day of trial and in the hearing of the application for approval of the proposed settlement. After the Board affirmed my ruling rejecting the proposed settlement, respondents did not participate further in the hearing of the case and they have not interposed objections or opposition to the charging parties' proposed findings and order. Accordingly, it cannot be said that respondents have in any way impeded or abused the Board's processes[5] and I shall not recommend that they be required to reimburse the Board or the charging parties for any of their expenses herein.

(b) The scope of the order to be recommended

Although the charging parties allege that the union has been guilty of repeated and widespread violations of the Act similar to those found herein, thereby showing a "proclivity" to engage in such conduct, there is only one prior adjudication of such violation. In *Union Nacional de Trabajadores and its agent Radames Acosta-Cepeda (Surgical Appliances Mfg., Inc.)*, 203 NLRB No. 11, issued April 23, 1973, the Board, on respondents' default in answering, rendered its decision finding that

> . . . on or about November 9, 1972, at or near the picket line described above, Respondent Acosta-Cepeda threw a stone at two employees who had crossed the picket line and reported to work;

[5] See *Condon Transport, Inc.*, 211 NLRB No. 37 (1974).

> on or about November 15, 1972, at or near the driveway located at the side of the Company's plant, Respondents through their agent Amada Torres, a picketing employee, inflicted damage to the property of a company official in the presence of employees; on or about November 15, 1972, at or near the loading platform entrance to the Company's plant, Respondents by their picketing employees and other unkown agents, led by Respondent Acosta-Cepeda, surrounded the car of a company official driving non-striking employees to work and blocked and impeded the access of said employees to the Company's plant; on or about November 15, 1972, at or near the loading platform entrance to the Company's plant, Respondent Acosta-Cepeda assaulted an employee passenger of the car described above, poured hot coffee over a company supervisor, and attacked the wife of the Company's president, all in the presence of company employees; and on or about December 4, 1972, at or near the entrance to the Company's premises, Respondent Acosta-Cepeda assaulted the Company's president.

By the aforesaid acts and conduct, the Board found that respondents had restrained and coerced employees in the exercise of the rights guaranteed them under Section 7 of the Act and had thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

In addition to this Board order, the charging parties have directed my attention to two Board orders against the respondent union entered on settlement stipulations. No reliance may be placed upon these consent orders; not only has the Board expressly declined, in determining the scope of an order to be issued, to consider such consent orders,[6] but examination of the stipulations

[6] *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (C&T Trucking Co.)*, (continued)

upon which those consent orders were entered discloses that in each case the parties expressly provided that the execution there of should not be deemed an admission of violation of the Act by the union.

The remaining material which, the charging parties contend, shows the "proclivity" of respondent union to engage in similar conduct, and which justifies a broad order herein, consists of allegations of such conduct in complaints and other proceedings against it. These, of course, are mere statements of parties; they provide no probative evidence of the proclivity in question, and no weight can be given to them. Similarly, no weight can be given to the issuance of the temporary restraining order in this case since it was, at most, a finding that there was "reasonable cause to believe" that the Act was being violated.

The nature and extent of the restraint and coercion exerted by respondents through the violence and threats of violence shown in this case and in the *Surgical Appliances* case, however, show that they have adopted these practices as part of their normal method of carrying on their activities.

Although it must be kept in mind, in fashioning remedial orders designed to prohibit repetition of the unfair labor practices found, that the courts have repeatedly stated their reluctance to enforce broad orders that would, in effect, substitute prosecutions for contempt of their orders for the Board proceedings that would normally be brought against subsequent violations of the Act,[7] their reluctance has been largely based upon their concern that such future conduct, although violative of the same section of the Act, might differ considerably in substance from the conduct against which the order was directed.

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[6] (continued)
191 NLRB 11 (1971), see also *Communications Workers of America, AFL-CIO and Local 4372 [Ohio Consolidated Telephone Co.] v. N.L.R.B.*, 362 U.S. 479, 481 (1960).

[7] *San Francisco Local Joint Executive Board of Culinary Workers, et al., v. N.L.R.B.*, F.2d , 86 LRRM 2828 (C.A.D.C., June 21, 1974) and cases cited therein.

In this case, however, the type of future conduct that would be prohibited by a broad order against coercive conduct will be precisely the same conduct as that found to have been extensively committed by respondents in this case and in the *Surgical Appliances* case; namely, violence and threats of violence. A broad order in those terms would, therefore, meet the test laid down by the Supreme Court in *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 436-437 (1941), that:

> The breadth of the order, like the injunction of a court, must depend on the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. . . . To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.

Moreover, the nature of these violations is so inimical to the conduct of labor relations sought to be regulated by the Act as to justify use of the strongest available measures to restrain them. In *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), which I cited in rejecting the proposed settlement, the Supreme Court drew a line between efforts to persuade through the exercise of the constitutionally guaranteed rights of free speech and picketing and those to compel through violence and the threats thereof. So would I here draw a line between the specificity of an order designed to prevent recurrence of other unfair labor practices and the breadth of an order to restrain future violence.

Accordingly, the recommended order to be entered herein will restrain respondents from acts of violence and threats of violence, by words and actions

such as striking persons or their cars, or blocking their movement, against employees of any employer in Puerto Rico.[8]

The situation with respect to the provisions of the order relating to violations of Section 8(b)(4)(i) and (ii)(B) is quite different. In the first place, there is no history of prior violations of this section by respondents and it has not been established, on this record, that the use of unlawful secondary activity has been adopted by them as an integral part of their habitual tactics in labor relations. Second, the acts and conduct that, in the context of this case, are found to constitute unfair labor practices might not, in some future context, constitute such violation. Accordingly, although respondents will be enjoined from further acts and conduct similar to that found to have been committed herein, the order will be limited to activities directed against Merck, its employees, and employees of employers dealing with Merck. There is no evidence that respondents committed unfair labor practices, as defined in Section 8(b)(4), against employers other than Merck, doing business with Catalytic, or their employees. With respect to Merck and employers doing business with it, however, the order will cover Puerto Rico.

(c) The mailing of the notice

The charging parties request that the order herein contain a provision requiring respondents to sign an appropriate notice, in English and in Spanish, and to provide both Catalytic and Merck with a sufficient number of copies thereof. It is not clear, from the charging parties' request, whether they are willing to mail the notices themselves or whether they seek to have respondents do so. The order to be recommended herein will provide that respondents

[8] *Union de Tronquistas de Puerto Rico, Local 901, affiliada a la International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Hotel La Concha)*, 193 NLRB 591 (1971).

perform the task and stand the expense of such mailing.[9] In view of the widespread nature of respondents' restrain and coercion of employees of Merck, Catalytic, Chase, Hernandez, and Industries, only direct communication from respondents to all the employees affected can serve as an adequate remedy for the unlawful conduct of the respondents.

(d) The language of the notice

The charging parties request that the wording of the notice be such as to be easily understood by the employees who were subject to respondents' unlawful conduct. This request is supported by Board practice and court approval over the past several years and it will be granted. The notice to be provided herein will be the one suggested by the charging parties, amended only as required by the scope of the order to be recommended.

(e) Reimbursement of lost wages to employees prevented from working by respondents' unfair labor practices

As stated above with respect to the award of litigation expenses, it may be assumed that the Board has the power to direct reimbursement of lost wages to employees prevented from working through unlawful restrain and coercion by a labor organization.

The Board, however, has determined as a matter of policy that it will not grant such reimbursement. In *Union de Tronquistas de Puerto Rico, Local 901, affiliada a la International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Lock Joint Pipe & Co. of Puerto Rico)*, 202 NLRB No. 43 (1973), the conduct found to have been committed by the union was every bit as violent and aggravated as that committed by respondents in this case. The Administrative Law Judge in that case recommended a "make-whole" remedy for the employees kept from working by the union's violence and threats thereof. The Board declined to direct that remedy and

[9] *Union de Tronquistas (Hotel La Concha), supra.*

this expression of Board policy is binding on me.[10] Contrary to the argument of the charging parties herein, I do not find, in the Board's statement in *Union de Tronquistas de Puerto Rico, Local 901, etc. (F.F. Instrument Corporation)*[11] that it was "unnecessary to pass on this question since there is no evidence that any employee lost worktime or wages," anything indicating an imminent change by the Board in the position it has taken on this subject. The charging parties, if so advised, may address their argument on this subject to the Board.

Upon the foregoing findings of fact, I reach the following:

Conclusions of Law

1. Respondent, Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga de Catalytic, are labor organizations within the meaning of Section 2(5) of the Act.

2. Each respondent herein acted as the agent of the other within the meaning of Sections 2(13) and 8(b) of the Act.

3. Catalytic Industrial Maintenance Co., Inc.; Merck Sharp & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; and Industries Freight are employers within the meaning of Section 2(2) of the Act and are engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. By the acts set forth in findings of fact numbered 12 through 28; 30 through 40; 42 through 45; 47; 49 through 55; 59; and 60, respondents and each of them induced and encouraged employees of Merck, Hernandez, Chase, Industries Freight, and other persons engaged in commerce and industries affecting commerce to engage in a strike or refusal to perform services

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[10] *Insurance Agents' International Union (Prudential Insurance Company of America)*, 119 NLRB 768 (1957).

[11] 210 NLRB No. 153 (1974).

for their employers, with an object of forcing or requiring (a) such employers to cease doing business with Catalytic and with each other; and (b) forcing or requiring Catalytic to recognize or bargain with respondents, or either of them, as the representative of its employees although neither respondent had been certified as the representative of such employees under the provisions of Section 9 of the Act, and respondents thereby engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) of the Act.

5. By the acts set forth in findings of fact numbered 12 through 28; 30 through 40; 42 through 45; 47; 49 through 55; 59; and 60, respondents and each of them threatened, restrained, and coerced Merck, Hernandez, Chase, Industries Freight, and other employers and persons engaged in commerce or in an industry affecting commerce with an object of (a) forcing or requiring Merck and other persons, as well as other employers, to cease doing business with Catalytic and with each other; and (b) forcing or requiring Catalytic to recognize or bargain with the respondents or either of them as the representative of its employees although neither respondent had been certified as the representative of such employees under the provisions of Section 9 of the Act, and respondents thereby engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

6. By the acts set forth in findings of fact numbered 13 through 50, and 52 through 59, respondents have restrained and coerced the employees of Merck, Catalytic, Hernandez, Chase, Industries Freight, and other employers in their exercise of rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

Respondent Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga de Catalytic, their officers, agents, and successors, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharp & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, or the employees of any other employer in Puerto Rico, by mass picketing and other blocking tactics designed to prevent their ingress and egress to perform services for their respective employers at the premises of Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc., or Catalytic Industrial Maintenance Co., Inc., anywhere in Puerto Rico.; or, by the use of force or violence or threats thereof, threatening to inflict or actually inflicting physical injury or damage to the persons, families, or property of such employees, in order to compel them to honor respondents' picket line established at such premises in connection with any labor dispute respondents may have with Catalytic Industrial Maintenance Co., Inc.

(b) Inciting, instigating, or permitting pickets or strikers under respondents' control and direction to block or impede the ingress and egress at such premises of supervisors, executives and other management representatives of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc., Chase Overseas, Inc.; or Industries Freight, or any other employer in Puerto Rico; or, by the use of force or violence or threats thereof, threatening to inflict or actually inflicting physical injury or damage to their persons, families, or property, for the purpose of

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

preventing them from rendering services at said premises during the course of any dispute respondents may have with Catalytic Industrial Maintenance Co., Inc.

(c) In any like or related manner restraining employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, or any other employer in Puerto Rico, in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

(d) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made, or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or in any manner or by any means threatening, coercing, or restraining Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (1) to force or require Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc., or any other person, to cease doing business with Catalytic Industrial Maintenance Co., Inc., or with each other, or (2) to force or require Catalytic Industrial Maintenance Co., Inc., to recognize or bargain with Union Nacional de Trabajadores, Comite Organizador Obreros en Huelga de Catalytic, or any other labor organization, as the representative of its employees, unless or until Union Nacional de Trabajadores, Comite

Organizador Obreros en Huelga de Catalytic, or such other labor organization, has been certified as the representative of such employees under the provisions of Section 9 of the Act.

2. Take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

(a) Post at its business office at Calle Parque 214 (altos), Rio Piedras, Puerto Rico, in Spanish and English, copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by representatives of Union Nacional de Trabajadores and Comite Organizador Obreros en Huelga de Catalytic, shall be posted by respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 24 signed copies of the said notice, in both Spanish and English, for posting, if willing, by Catalytic Industrial Maintenance Co., Inc., and by Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc., at the latter's premises in Barceloneta, Puerto Rico, and at the premises of either of them at any other location in Puerto Rico, in places where notices to employees are customarily posted.

(c) Under the direction of the Regional Director of Region 24, mail signed copies of said notice, in English and in Spanish, to each employee in Puerto Rico of Catalytic Industries Maintenance Co., and of Merck, Sharpe &

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[13] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; and Industries Freight.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps they have taken to comply herewith.

Dated at Washington, D.C., September 30, 1974

/s/ Sidney D. Goldberg
Sidney D. Goldberg
Administrative Law Judge

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APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice. To carry out the Order of the Board and any subsequent judgment of a court enforcing the Board's Order, we hereby notify you as follows:

WE WILL NOT use threats or force, violence, or property damage to restrain or coerce employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or employees of any other employer in Puerto Rico, from engaging in their employment.

WE WILL NOT use mass picketing and other blocking tactics designed to prevent employees or supervisors or other managers of Catalytic, Merck, Hernandez, Chase, Industries Freight, or any other employer in Puerto Rico, from entering their place of

employment in order to compel them to honor a picket line established by us.

WE WILL NOT engage in, or induce or encourage any person employed by Merck, Hernandez, Chase, Industries Freight, or any person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of his employment to perform any services, where an object thereof is to force or require Merck, or any other person in Puerto Rico, to cease doing business with Catalytic or where an object is to force or require Catalytic to recognize or bargain with us or any other labor organization as the representative of its employees unless or until we or such other labor organization has been certified as the representative of Catalytic's employees under the provisions of Section 9 of the National Labor Relations Act.

WE WILL NOT threaten, coerce, or restrain Merck, Hernandez, Chase, Industries Freight, or any other person or employer engaged in commerce or in an industry affecting commerce, where in any case it has one of the above-described objects.

WE WILL NOT in any other manner restrain or coerce employees of Catalytic, Merck, Hernandez, Chase, Industries Freight, or employees of any other employer in Puerto Rico, in the exercise of rights guaranteed employees by Section 7 of the National Labor Relations Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Pan American Building, Seventh Floor, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico, Telephone 106-622-0247, or the Board's mailing address at P.O. Box UU, Hato Rey, Puerto Rico 00919.

WE WILL mail a copy of this notice, at our own expense, to each employee of Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Catalytic Industrial Maintenance Co., Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; and Industrial Freight.

UNION NACIONAL DE TRABAJADORES
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

COMITE ORGANIZADOR OBREROS EN HUELGA DE CATALYTIC
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

[July 23, 1975]

* * * * *

DECISION AND ORDER

On September 30, 1974, Administrative Law Judge Sidney D. Goldberg issued the attached Decision in this proceeding. Thereafter, Respondents, Charging Parties, and the General Counsel filed exceptions and supporting briefs.[1]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge.

Member Kennedy's dramatically phrased dissent from our failure to award reimbursement of lost pay to employees who putatively were coerced into joining the strike, here and in the two companion cases, is based in great part

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[1] The request for oral argument by the Respondents is hereby denied as the record and briefs adequately present the issues and positions of the parties.

upon legal arguments made in his joint dissent, with former Chairman Miller, in the *Lock Joint Pipe* case.[2] We rejected those arguments there. Moreover, the fact that the full Board has so recently reviewed the policy considerations involved in awarding such reimbursement, as reflected in the opinions therein, is itself persuasive consideration against reopening this debate of long standing. The majority in *Lock Joint Pipe* decided to affirm the Board's prior decisions which as of then had "stood the test of 24 years of court litigation and Congressional scrutiny."[3] Subsequent to *Lock Joint Pipe,* in the only case in which that policy was before a court for review, our refusal to award such a remedy was affirmed.[4]

In *Lock Joint Pipe,* as here, the union involved had repeatedly and flagrantly violated the Section 7 rights of employees. The only new argument we perceive in our colleague's dissent is that he is shocked by Respondent Union's expressed contempt for the law and the Board, as well as by its actions which reflect contempt for employee rights. This argument appears to call not so much for remedy as for punishment. That, of course, is not part of our statutory function.

Since there is an established and effective judicial remedy for actions in contempt of our lawful orders, we see no basis for adopting an extraordinary remedy to vent our displeasure over Respondent Union's expressed attitude. Unlike our dissenting colleague, counsel for the General Counsel has not asked

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[2] *Union de Tronquistas de Puerto Rico, Local 901, affiliada a la International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Lock Joint Pipe & Co. of Puerto Rico),* 202 NLRB 399 (1973).

[3] *Ibid.*

[4] *N.L.R.B. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO [Catalytic Industrial Maintenance Company, Inc.],* 476 F.2d 1031 (C.A. 1, 1973). Coincidentally, the same employer, although a different union, is before us in the instant case.

us to overrule or distinguish *Lock Joint Pipe.* Indeed, the General Counsel himself, in accord with one of the alternatives suggested in the majority opinion therein, has recently issued instructions on procedures for Regional Directors to follow in submitting recommendations for preliminary injunctions under Section 10(j), in cases of apparent violations of Section 8(b)(1)(A) involving violence or blocking of access to the place of employment.[5] We have every reason to believe, therefore, that the General Counsel has undertaken to give serious consideration to the use of this remedy in appropriate cases, that he will promptly bring to the Board's attention any situations in which he thinks we should authorize it, and that this will be regarded as a continuing obligation of that office. We think preliminary injunctive relief and appropriate use of contempt proceedings will provide more prompt and effective remedies than reimbursement of pay. They have the further advantage of not burdening our administrative proceedings with the difficult, exhausting, and potentially divisive task of determining which employees were absent from work because of union coercion, a burden which could substantially delay the disposition of such cases.

We noted in *Lock Joint Pipe* that employees legally damaged by the tortious conduct of unions might be better served by pursuing those private remedies traditionally used for the recovery of such damages. Use of such remedies would bring these employees before tribunals which have more experience and are better equipped than this Board to measure the impact of tortious conduct,

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[5] Nash, "Requests for Section 10(j) Injunctive Relief in Section 8(b)(1)(A) Cases" (January 30, 1975). These instructions state, for instance, that a 10(j) injunction may be warranted where the local or state police are ineffective in controlling the conduct, resulting in danger to employees or others seriously restraining their statutory rights, which would not be effectively remedied by a Board Order in the normal course.

including violence, and to make the victims whole, for loss of pay and any other injury.[6]

ORDER[7]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Union Nacional de Trabajadores, Rio Piedras, Puerto Rico, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, or the employees of any other employer in Puerto Rico, by mass picketing and other blocking tactics designed to prevent their ingress and egress to perform services for their respective employers at the premises of Merck, Sharpe & Dohme Quimicas de

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[6] Member Jenkins observes further that awarding backpay to workers intimidated by union actions is rather analogous to awarding backpay to workers who strike because of unlawful employer intimidation or coercion. In both types of cases, we would be faced with measuring how much and what kind of harassment or coercion justified the workers' refusal to work. And why not, if the employer's intimidation prevented the employees from choosing union representation, award as backpay the additional wages which the union might have secured for them?

[7] In view of Respondent Union's repeated violations of the Act, whose authority it refuses to recognize, and considering the nature and extent of its unlawful conduct, as shown in this case, in the recent *Union Nacional de Trabajadores and its Agent Radames Acosta-Cepeda (Surgical Appliances Mfg., Inc.)*, 203 NLRB No. 106 (1973), and in the companion cases issued this day, *Union Nacional de Trabajadores and its Agent Alcides Serrano (Jacobs Constructors Company of Puerto Rico)*, 219 NLRB No. 65 (1975), and *Union Nacional de Trabajadores and its Agent Arturo Grant (Macal Container Corporation)*, 219 NLRB No. 67 (1975) we have found it necessary to modify the Order recommended by the Administrative Law Judge in certain respects so as to better effectuate the policies of the Act and serve the public interest.

However, we do not believe that the same broad order and extraordinary remedial provisions are necessary in the case of Respondent Comite. The Comite consists only of employees of Catalytic and the only misconduct chargeable to it has arisen in the dispute with Catalytic herein.

Puerto Rico, Inc., or Catalytic Industrial Maintenance Co., Inc., anywhere in Puerto Rico; or, by the use of force or violence or threats thereof, threatening to inflict or actually inflicting physical injury or damage to the persons, families, or property of such employees, in order to compel them to honor Respondent's picket line established at such premises in connection with any labor dispute Respondent may have with Catalytic Industrial Maintenance Co., Inc.

(b) Inciting, instigating, or permitting pickets or strikers under Respondent's control and direction to block or impede the ingress and egress at such premises of supervisors, executives, and other management representatives of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, or any other employer in Puerto Rico; or, by the use of force or violence or threats thereof, threatening to inflict or actually inflicting physical injury or damage to their persons, families, or property, for the purpose of preventing them from rendering services at said premises during the course of any dispute Respondent may have with Catalytic Industrial Maintenance, Co., Inc.

(c) In any other manner restraining employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, or any other employer in Puerto Rico, in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

(d) Inducing or encouraging, by picketing or any other means, any individual employed by Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform services

for their respective employers, where an object thereof is to force or require Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc., or any other person, to cease doing business with Catalytic Industrial Maintenance Co., Inc.; or to force or require Catalytic Industrial Maintenance Co., Inc. to recognize or bargain with Union Nacional de Trabajadores as the representative of its employees, unless or until Union Nacional de Trabajadores has been certified as the representative of such employees under the provisions of Section 9 of the Act.

(e) Threatening, restraining, or coercing Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or any other person engaged in commerce, or in an industry affecting commerce, particularly by the use of threats, force, violence, or property damage, where an object thereof is to force or require Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc., or any other person, to cease doing business with Catalytic Industrial Maintenance Co., Inc.; or to force or require Catalytic Industrial Maintenance Co., Inc., to recognize or bargain with Union Nacional de Trabajadores as the representative of its employees, unless or until Union Nacional de Trabajadores has been certified as the representative of such employees under the provisions of Section 9 of the Act.

2. Take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

(a) Post at its business office at Calle Parque 214 (altos), Rio Piedras, Puerto Rico, in both Spanish and English, copies of the attached notice marked "Appendix A."[8] Copies of said notice, on forms provided by the Regional

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Director for Region 24, after being duly signed by representatives of Union Nacional de Trabajadores, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forthwith mail copies of said notice, in both Spanish and English, to said Regional Director, after said copies have been signed as provided above, for mailing of said notice by the Regional Director to each employee in Puerto Rico of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc., and Industries Freight; and to each of the aforesaid companies for posting by them, if willing, at their premises at any location in Puerto Rico in places where notices to employees are customarily posted.

(c) Publish said notice, at its own expense, in all newspapers of general distribution published in Puerto Rico, and in any newspapers of Respondent, in each case in the language in which the newspaper is printed.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

B. Respondent Comite Organizador Obreros en Huelga de Catalytic, Barceloneta, Puerto Rico, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, by mass picketing and other blocking tactics designed to prevent their ingress and egress to perform services for their respective employers at the premises of Merck, Sharpe &

& Dohme Quimicas de Puerto Rico, Inc., or Catalytic Industrial Maintenance Co., Inc., anywhere in Puerto Rico; or, by the use of force or violence or threats thereof, threatening to inflict or actually inflicting physical injury or damage to the persons, families, or property of such employees, in order to compel them to honor Respondent's picket line established at such premises in connection with any labor dispute Respondent may have with Catalytic Industrial Maintenance Co., Inc.

(b) Inciting, instigating, or permitting pickets or strikers under Respondent's control and direction to block or impede the ingress and egress at such premises of supervisors, executives, and other management representatives of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight; or, by the use of force or violence or threats thereof, threatening to inflict or actually inflicting physical injury or damage to their persons, families, or property, for the purpose of preventing them from rendering services at said premises during the course of any dispute Respondent may have with Catalytic Industrial Maintenance Co., Inc.

(c) In any like or related manner restraining employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

(d) Inducing or encouraging, by picketing or any other means, any individual employed by Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or any other person engaged in commerce or in industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform services for their respective employers, where an object thereof is to force or require Merck,

Sharpe & Dohme Quimicas de Puerto Rico, Inc., or any other person, to cease doing business with Catalytic Industrial Maintenance Co., Inc.; or to force or require Catalytic Industrial Maintenance Co., Inc., to recognize and bargain with Comite Organizador Obreros en Huelga de Catalytic as the representative of such employees under the provisions of Section 9 of the Act.

(e) Threatening, restraining, or coercing Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or any other person engaged in commerce, or in an industry affecting commerce, particularly by the use of threats, force, violence, or property damage, where an object thereof is to force or require Catalytic Industrial Maintenance Co., Inc., to recognize or bargain with Comite Organizador Obreros en Huelga de Catalytic as the representative of its employees, unless or until Comite Organizador Obreros en Huelga de Catalytic has been certified as the representative of such employees under the provisions of Section 9 of the Act.

2. Take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

(a) Post at its business office, in both Spanish and English, copies of the attached notice marked "Appendix B."[9] Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by representatives of Comite Organizador Obreros en Huelga de Catalytic, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 24 signed copies of the said notice, in both Spanish and English, for posting, if willing, by Catalytic Industrial

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[9] See fn. 8, *supra*.

Maintenance Co., Inc.; and by Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc., Juan Hernandez, Inc., Chase Overseas, Inc., and Industries Freight, at their premises at any location in Puerto Rico, in places where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., July 23, 1975.

Betty Southard Murphy,	Chairman
John H. Fanning,	Member
Howard Jenkins, Jr.,	Member
John A. Penello,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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MEMBER KENNEDY, dissenting in part:

This is Union Nacional and we kill people. So leave.

This proclamation, made by Respondent Nacional's president, Arturo Grant, to an employee seeking to cross a picket line and perform his job, dramatically demonstrates the utter contempt with which this Union holds employees' Section 7 rights. Never in my 28 years with this Agency have I encountered such continuous reprehensible conduct on the part of union officials as is displayed in this case and the two companion cases issued herewith.[10] As the Administrative Law Judge in this case put it:

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[10] *Union Nacional de Trabajadores and its Agent Alcides Serrano (Jacobs Constructors Company of Puerto Rico)*, 219 NLRB No. 65 (1975); *Union Nacional de Trabajadores and* (continued)

> The nature and extent of the restraint and coercion exerted by respondents through the violence and threats of violence shown in this case and in the *Surgical Appliances* case,[11] however, show that they have *adopted these practices as part of their normal method of carrying on their activities.* [Emphasis supplied.]

My colleagues acknowledge the seriousness of the conduct found in these cases. And, yet, they fail to provide a remedy for the real victims of this conduct – the employees who were prevented from pursuing their livelihood and who were systematically subjected to assaults, threats of assaults, and similar violence. A notice is no substitute for lost wages. And if Respondents' officials are to be taken at their word, our notices and cease-and-desist orders will be meaningless as a deterrent to the commission of similar unlawful conduct in the future. In my judgment, the only meaningful and effective way to remedy these cases is to require Respondents to reimburse the employees for wages lost as a result of their unlawful restraint and coercion.[12]

In each of these three cases, Union Nacional de Trabajadores (hereafter Respondent or Union) is named as a respondent. In none of the cases is the Union certified or recognized as the representative of the employees involved.

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[10] (continued)
its Agent Arturo Grant (Macal Container Corporation), 219 NLRB No. 67 (1975). For a discussion of the unlawful conduct engaged in by this Respondent in those cases, see my dissenting opinions therein. The statement of President Grant quoted above occurred in the *Macal* case.

[11] *Union Nacional de Trabajadores and its agent Radames Acosta-Cepeda (Surgical Appliances Mfg., Inc.)*, 203 NLRB 106 (1973), is yet another case in which Respondent Nacional, through its officers, was found to have violated Sec. 8(b)(1)(A) by engaging in violence and threats of violence similar to that found here.

[12] See my joint dissent with former Chairman Miller in *Union de Tronquistas de Puerto Rico, Local 901, affiliada a la International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Lock Joint Pipe & Co. of Puerto Rico)*, 202 NLRB 399 (1973).

In the instant case (hereafter *Catalytic*), the employees of Catalytic Industrial Maintenance Co., Inc. – a construction firm – struck their employer on November 20, 1973, at its jobsite on the premises of Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.[13] Although separate gates were established for Catalytic and Merck employees, all entrances to Merck's 115-acre tract of land were picketed.[14] In order to acquire a perspective on the tactics utilized by Respondent's officials in denying to employees their Section 7 right to refrain from engaging in union activities, a chronological description of the major events in the *Catalytic* strike follows.

1. Pre-Restraining Order Conduct

The strikers first became effectively mobilized under the leadership of Efrain Serrano, Alcides Serrano, and Radames Acosta-Cepeda on Friday, November 23. All three are admitted agents of the Union.[15] On that date, Efrain Serrano announced that no employees or vehicles would be permitted to enter or leave the Merck plant. Accordingly, some 39 Merck employees were required to remain inside the plant during the entire 15-day period that the picketing continued. The establishment of makeshift living quarters and visitation privileges for spouses became necessary.

On this same day, trucks owned by Chase and by Hernandez, Merck suppliers, were detained at the gate, and the drivers thereof threatened with physical harm. Indeed, the Hernandez driver was forced to abandon his truck

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[13] All dates refer to calendar year 1973. In addition to the Union, the strike was also supported by co-respondent Comite Organizador Obreros en Huelga de Catalytic, an organization consisting primarily of Catalytic employees.

[14] Union officials readily acknowledged to Merck employees and officers the secondary object of the picketing at the entrances reserved for them.

[15] Alcides Serrano was named as an individual respondent in *Jacobs*. Acosta-Cepeda, Respondent's secretary-treasurer, was named as an individual respondent in *Surgical Appliances* and was also briefly involved in the *Jacobs* dispute.

with its explosive cargo of ammonia in the middle of the access road leading to the Merck plant. Thereafter until December 3, trucks owned by Chase were daily refused entrance to Merck's premises and were stoned each time they attempted to service Merck or adjacent customers.[16] In addition to the truckdrivers, several Merck employees were also threatened with physical harm if they "interfered with" the pickets.

During the weekend of Saturday, November 24, and Sunday, November 25, Efrain Serrano threatened to bomb Merck's water supply and cut off the electricity. The electricity was in fact subsequently short-circuited by a chain thrown across several high voltage wires. As earlier, the trucks of suppliers continued to be turned away.

Over the weekend, Merck officials became increasingly concerned with the dangerous condition created by the location of the Hernandez ammonia truck on the access road. Pleas that Merck was not involved in the strikers' dispute with Catalytic and warning that the truck presented a grave danger to everyone proved unavailing. Three union agents, Carlos Rodriguez and Efrain and Alcides Serrano, adamantly refused to permit the truck to be moved. Finally, at 4 a.m. on Monday morning, November 26, the truck was moved with a police escort. Efrain Serrano threatened to kill both the truckdriver and the Merck plant manager who planned the move.

Merck employees attempting to report for work Monday morning were surrounded by approximately 20 pickets and were told by Efrain Serrano that they could not go in. In the process, nine cars were turned away and

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[16] The harassment of suppliers and other individuals having business at a struck facility is a technique frequently utilized by Respondent. In *Jacobs*, for example, a truckdriver, as well as a representative from the Environmental Quality Board (a local governmental agency), was threatened. The government agent was told by Alcides Serrano that he (Serrano) "was going to hit him" and "would break his bones" if he did not leave and, should the agent return the pickets "would tear his car up."

one car was hit with sticks and other objects. In a similar fashion, the second- and third-shift employees were prevented from working. Employees caught inside the plant were warned not to leave. Employees who did not cooperate with the strike were threatened with physical harm.[17]

Monday, November 26, also proved to be a difficult day for Merck's personnel manager, Victor Charron: the car in which he was riding was hit, kicked, and detained until the police intervened. Thereafter, Efrain Serrano warned Charron that "I'll cut you in Barceloneta [a nearby town]."[18]

On Tuesday, November 27, the pickets continued to harass individuals attempting to work. A car occupied by several Merck female secretaries was struck repeatedly as it passed through the picket line, as was a car driven by a Catalytic area superintendent. A Merck utility supervisor was punched in the jaw; a Merck safety engineer was struck by a picket; Efrain Serrano threatened to assault a Merck production supervisor, and Catalytic's mechanical superintendent, Sam Ambrose, had his car struck and was threatened with physical harm if he crossed the picket line. Finally, Alcides Serrano and several pickets blocked the access road within Merck's plant area by parking two cars across the road.

On Wednesday, the pickets threatened to blow up the Merck plant with all of the employees inside. In addition, a car driven by Merck employee

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[17] As my separate dissenting opinions in *Jacobs* and *Macal* indicate, in all three of the cases employees who desired to return to work were forcibly detained from doing so. In *Jacobs*, Alcides Serrano quickly extinguished a back-to-work movement which had started in his absence from the jobsite. He thereafter imported a "gang" of 8-12 nonemployees "who, carrying pipes and sticks, [mingled] with the striking employees" for the announced purpose of guaranteeing that "no one will go to work." In *Macal*, several employees were told by President Grant, "This is Union Nacional and we are not responsible for what will happen to you . . . . Get the hell out of here." At another point, according to the credited testimony, Grant indicated that if the employees were to work, he "would blow the top of their heads off."

[18] Management officials have been subjected to physical abuse by Respondent's officials. In *Surgical Appliances*, for example, Acosta-Cepeda poured hot coffee on a company (continued)

Pacheco Sanchez required police assistance to get through the picket line. Sanchez was told by Efrain Serrano that he (Serrano) was going "to get him at his home," and "give him a beating."

The United States District Court for the District of Puerto Rico issued a temporary restraining order against all secondary picketing. The order was served on Respondent the following day, Sunday, December 2.

2. Post-Restraining Order Conduct

The pickets ignored the restraining order.[19] On Monday morning, two Merck employees had their cars stoned when they attempted to enter the plant. On Tuesday, Secretary-Treasurer Acosta-Cepeda blocked the main entrance to the plant with a car and threw stones at the car of a Catalytic project superintendent.[20]

Finally, matters came to a head on Wednesday, December 5, when a caravan of Catalytic employees attempting to go to work were intercepted by five cars carrying union officials and agents armed with clubs and other weapons. The union agents started pounding one of the cars and Alcides Serrano struck Catalytic General Foreman Urbiztondo. The Catalytic employees left their cars and formed a line along the side of the road creating a dangerous confrontation. Violence was averted only by police intervention. Later that

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[18] (continued)
supervisor and assaulted both the company president and his wife. In *Jacobs*, Alcides Serrano told the construction superintendent, "I'm going to bust your face," and had to be restrained from subsequently striking this same individual with a hammer. Finally, in *Macal*, President Grant pushed the company president down a flight of stairs, the injuries from which required 5 months' of hospitalization.

[19] This is precisely the response which Acosta-Cepeda had earlier defiantly predicted. On November 26, he told the employees that "Nacional had already disregarded and violated an injunction," and on November 27 promised that "the unions were not going to obey such injunction . . . [and] the union was ready to go to jail."

[20] Acosta-Cepeda was found in *Surgical Appliances* to have thrown stones at employees crossing the picket line to go to work.

day, Catalytic employee Ismael Rodriguez was threatened with a knife by Alcides Serrano who wanted to know why he had gone to work; was threatened by Efrain Serrano with a hammer; and was pushed and forced into a fight by Union Agent Julio Denis. The strike finally ended on December 6.

The foregoing conduct illustrates the contempt with which this Union has treated employee rights. Pronouncements by union officials during the *Jacobs* hearing clearly demonstrate that such conduct is certain to continue in the future – Board and court cease-and-desist orders to the contrary notwithstanding. For, as the Administrative Law Judge in *Jacobs* found, the union officials hold "the Act and its administration in contempt." Acosta-Cepeda, for example, stated:

> [The] only thing we have to say is that these are fabricated cases and we do not wish to continue with this spectacle.

Union Organizer Elias Samuel Castro-Ramos proclaimed during the *Jacobs* hearing[21] that he "does not recognize the authority of the law or of the Board that administers the law." He then testified as follows:

> The main [function of an organizer for Respondent Union] is to see that the workers' rights are respected, that *the laws that are in effect in this country be applied in a manner favorable to the workers and when they cannot be they should be violated.*
>
> * * * * *
>
> First of all we [Union organizers] explain to [the workers] the unfairness of the Taft-Hartley Law which represents a straight jacket for the workers because it does not permit the normal development of organization; that law represents a whole bureaucratic system which only serves to delay the organization process

[21] Castro-Ramos was also involved in the unlawful conduct found in *Macal*.

> and permits lawyers like [the Company's attorney] and companies like Jacobs [to] go over the wishes of the majority of the employees in a shop. [Emphasis supplied.]

It is evident that Castro-Ramos' assertion that the law should be applied in a "manner favorable to the workers" has reference to only those workers who support this particular Union. It is obvious that as far as Union Nacional officials are concerned employers and workers opposed to their efforts have no rights.

I am mystified by the failure to give a meaningful remedy to the real victims of the violent conduct in these cases – those employees who were restrained and coerced from going to work. The failure to give a monetary remedy here is in sharp contrast to a recent case where two of my colleagues in the majority ordered reimbursement of $27.60 in postage fees to a labor organization.[22] But my colleagues are unwilling to order a labor organization to reimburse lost wages to employees who were prevented from working by the Union's widespread violence in open defiance of the Act.

The authority of the Board to issue backpay orders is derived from Section 10(c) of the Act:

> [W]here an order directs reinstatement of an employee, back pay may be required of the employer *or labor organization*, as the case may be, responsible for the discrimination suffered by him . . . . [Emphasis supplied.]

We have held, with court approval, that it is unnecessary to find an 8(b)(3) violation as a prerequisite to issuing a backpay order against a labor organization – an 8(b)(1)(A) violation, standing alone, is sufficient.[23] Indeed, the

[22] *F.W. Woolworth Co.*, 216 NLRB No. 155 (1975).

[23] *The National Cash Register Company*, 190 NLRB 581, 585 (1971), enfd. 466 F.2d 945, 946 (C.A. 6, 1972), cert. denied, 410 U.S. 966 (1973).

Supreme Court in *Phelps Dodge Corporation v. N.L.R.B.*, instructed that "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Bord enforces."[24]

It is difficult to conceive of a situation in which backpay orders could be more appropriate than in the instant case. What purpose of the Act is effectuated and what public interest is served by withholding backpay? We are not concerned here with those occasional situations in which tempers flare on the picket line and strikers momentarily engage in what has been euphemistically referred to as "mere animal exuberance." Here we are dealing with a drastically more serious problem. We are dealing with a labor organization which denounces the laws applicable to its conduct and which systematically threatens the lives of any and all individuals who dare to act in any manner contrary to its self-interest. In my judgment, the public has every right to expect this Board to issue a backpay order to the victims of the statutory violations committed by Respondents. We cannot justify uneven, inequitable applications of the Act.

In *Phelps Dodge Corp., supra*, Mr. Justice Frankfurter praised this Board for the manner in which it had historically exercised its authority to award backpay. He stated:

> [In] applying its authority over back pay orders, the Board has not stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.[25]

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[24] 313 U.S. 177, 197 (1941).

[25] 313 U.S. at 198.

With these three decisions, the Board proves itself undeserving of such confidence. Accordingly, I dissent.

Dated, Washington, D.C., July 23, 1975.

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

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APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice. To carry out the Order of the Board and any subsequent judgment of a court enforcing the Board's Order, we hereby notify you as follows:

> WE WILL NOT use force or violence, or threats thereof, or cause property damage, to restrain or coerce employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; Industries Freight, or the employees of any other employer in Puerto Rico, from performing their work.
>
> WE WILL NOT use mass picketing and other blocking tactics designed to prevent employees or supervisors or other managers of Catalytic, Merck, Hernandez, Chase, Industries Freight, or any other employer in Puerto Rico, from entering their place of employment in order to compel them to honor a picket line established by us.

WE WILL NOT engage in, or induce or encourage any individual employed by Merck, Hernandez, Chase, Industries Freight, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of his employment to perform any services, where an object thereof is to force or require Merck, or any other person, to cease doing business with Catalytic, or where an object is to force or require Catalytic to recognize or bargain with us as the representative of its employees unless or until we have been certified as the representative of Catalytic's employees under the provisions of Section 9 of the National Labor Relations Act.

WE WILL NOT threaten, coerce, or restrain Merck, Hernandez, Chase, Industries Freight, or any other person or employer engaged in commerce or in an industry affecting commerce, where in any case it has one of the above-described objects.

WE WILL NOT in any other manner restrain or coerce employees of Catalytic, Merck, Hernandez, Chase, Industries Freight, or employees of any other employer in Puerto Rico, in the exercise of rights guaranteed employees by Section 7 of the National Labor Relations Act.

UNION NACIONAL DE TRABAJADORES
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 7th Floor, Pan Am Building, 255 Ponce de Leon Avenue, Hato Rey, Puerto Rico 00917, Telephone 809-622-0247.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice. To carry out the Order of the Board and any subsequent judgment of a court enforcing the Board's Order, we hereby notify you as follows:

WE WILL NOT use force or violence, or threats thereof, or cause property damage, to restrain or coerce employees of Catalytic Industrial Maintenance Co., Inc.; Merck, Sharpe & Dohme Quimicas de Puerto Rico, Inc.; Juan Hernandez, Inc.; Chase Overseas, Inc.; or Industries Freight, from performing their work.

WE WILL NOT use mass picketing and other blocking tactics designed to prevent employees or supervisors or other managers of Catalytic, Merck, Hernandez, Chase, or Industries Freight, from entering their place of employment in order to compel them to honor a picket line established by us.

WE WILL NOT engage in, or induce or encourage any individual employed by Merck, Hernandez, Chase, Industries Freight, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of his employment to perform any services, where an object thereof is to force or require Merck to cease doing business with Catalytic, or where an object is to force or require Catalytic to recognize or bargain with us as the representative of its employees unless or until we have been certified as the representative of

Catalytic's employees under the provisions of Section 9 of the National Labor Relations Act.

WE WILL NOT threaten, coerce, or restrain Merck, Hernandez, Chase, Industries Freight, or any other person or employer engaged in commerce or in an industry affecting commerce, where in any case it has one of the above-described objects.

WE WILL NOT in any like or related manner restrain or coerce employees of Catalytic, Merck, Hernandez, Chase, or Industries Freight, in the exercise of rights guaranteed employees by Section 7 of the National Labor Relations Act.

COMITE ORGANIZADOR OBREROS
EN HUELGA DE CATALYTIC
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Seventh Floor, Pan Am Building, 255 Ponce 7th de Leon Avenue, Hato Rey, Puerto Rico 00917, Telephone 809-622-0247.

United States Court of Appeals
For the First Circuit

No. 75-1372
NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
UNION NACIONAL DE TRABAJADORES AND ITS AGENT, ARTURO GRANT,
RESPONDENTS.

No. 75-1374
NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
UNION NACIONAL DE TRABAJADORES AND ITS AGENT, ARTURO GRANT,
RESPONDENTS.

No. 75-1375
NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
UNION NACIONAL DE TRABAJADORES AND ITS AGENT, ALCIDES SERRANO,
RESPONDENTS.

No. 75-1376
NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
UNION NACIONAL DE TRABAJADORES AND ITS AGENT, OBREROS EN HUELGA DE CATALYTIC,
RESPONDENTS.

ON APPLICATION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Robert A. Giannasi, Assistant General Counsel, with whom *John S. Irving*, General Counsel, *Elliott Moore*, Deputy Associate General Counsel and *Andrew F. Tranovich*, Attorney, were on brief, for petitioner.

Paul Schachter, with whom *David Scribner*, *Elizabeth Schneider*, *Luis M. Escribano*, *Ralph Shapiro*, and *Ismael Delgado Gonzalez* were on brief, for respondents.

June 21, 1976

COFFIN, *Chief Judge*. In this consolidated proceeding, the National Labor Relations Board petitions this court for enforcement of the orders it issued against the Union Nacional de Trabajadores (Union) and its agents in four separate unfair labor practice proceedings. The orders were issued to remedy numerous unfair labor practices that arose from violent incidents occurring at four Puerto Rican jobsites and involving several different companies and members and officials of the Union — all of whom are listed in the margin.[1] The major issues before us are the propriety of the Board's conclusions that the Union was guilty of the unfair labor practices found to have been committed and the appropriateness of the remedial features of the four orders.

[1] To simplify matters, we will list the cases by the docket number in this court and by the parties to the proceedings below: No. 75-1372, the Union and its agent Arturo Grant *and* Macal Container Corporation (Macal); No. 75-1374, the Union and its agent Arturo Grant *and* The Carborundum Company of Puerto Rico and Carborundum Caribbean, Inc. (Carborundum); No. 75-1375, the Union and its agent Alcides Serrano *and* Jacobs Constructors Company of Puerto Rico (Jacobs); No. 75-1376, the Union and Comite Organizador Obreros en Huelga de Catalytic (Comite) *and* Catalytic Industrial Maintenance Co., Inc. (Catalytic) *and* Merck, Sharpe & Dohme Quimicas de Puerto Rico (Merck).

In each of the four cases, the Board concluded that the Union had violated § 8(b)(1)(A) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(b)(1)(A), by threatening employees, supervisors, and/or outsiders under circumstances in which the result was interference with the rights conferred by § 7 of the Act, 29 U.S.C. § 157. In addition, in No. 75-1376, the Board also found that the Union had violated § 8(b)(4)(i) and (ii)(B) of the Act, 29 U.S.C. § 158(b)(4)(i) and (ii)(B) by threatening and actually inflicting physical harm upon employees of third parties in order to force those third parties to terminate business relations with Catalytic, one of the companies with which the Union had differences. In each of the four proceedings, the Board issued orders requiring the Union to cease and desist from the unfair labor practices found and from infringing in any other manner upon the § 7 rights of the employees.[2] In each case, the Board's orders require that the Union not only post copies of the notices at their offices and meeting places but also mail copies to all the employees of the companies that were involved and publish copies in every newspaper of general circulation in the Commonwealth.

In addition to finding that the Union had committed various unfair labor practices, the Board, in proceedings related to No. 75-1374, dismissed the Union's complaint that the employer had unlawfully refused to bargain with it and entered an order revoking the Union's certification as the Carborundum employees' collective bargaining representative and denying the Union the right to invoke the statutory procedures in aid of a demand for recognition until such time as the Carborundum employees demonstrate their support for the Union anew in an atmosphere free

[2] The Comite, which was found to be a separate labor organization, was not subjected to a broad order in No. 75-1376 because its activities had been confined to the Catalytic-Merck jobsite.

from the effects of the Union's coercion.

In opposing enforcement, respondents challenge the Board's substantive conclusions, the remedies it selected, and the procedures the Board followed in reaching its conclusions.[3] Because the substantive and remedial challenges to the Board's orders present discrete issues, we will discuss them separately. The facts will be stated together with the substantive discussions. Several of respondents' arguments are too frivolous to warrant any discussion.

I. The Union's Unfair Labor Practices[4]

No. 75-1372. Here the Board concluded that the Union and its agent and president, Arturo, Grant violated § 8(b)(1)(A) by (1) brutally assaulting Macal's president, Manuel Calderon, in the presence of several of its employees, and (2)

[3] The Union's procedural objection is that the hearings it received before the various administrative law judges violated due process because greater steps were not taken to account for the fact that many of the witnesses and Union agents either spoke only Spanish or were much more adept in Spanish than English. The Board's practice in these hearings was to utilize translators whenever a witness did not understand or speak English well enough to testify in English. Only the English translation of the question and the response was transcribed. The parties, of course, were free to dispute the accuracy of any translation and to request that further questions be asked in order to clarify the meaning of the witness's response. Significantly, there is nothing in the record suggesting that any of the respondents were in any way prejudiced by any linguistic or translation errors; indeed, there is no indication that any material uncorrected errors occurred. We are satisfied that the Board's procedures were sufficiently reliable to satisfy due process.

Respondents propose various alternatives to the present practice — conducting the proceedings in Spanish, transcribing both the English translation and the Spanish testimony to facilitate correcting errors in translation, or supplying the charged parties with interpreters, as is required in criminal proceedings, *see United States ex rel. Negron* v. *New York*, 434 F.2d 386 (2d Cir. 1970). Although each of the proposed alternatives may well make it easier for certain charged parties to present their cases, each would entail considerable administrative inconvenience and expense. Here, where respondents' interest is only to avoid a civil sanction, we conclude that the governmental interest in retaining the present procedures outweighs respondents' interest in the additional procedural safeguards. *See Carmona* v. *Sheffield*, 475 F.2d 738 (9th Cir. 1973); *cf. Goldberg* v. *Kelly*, 397 U.S. 254, 262-64 (1970); *United States* v. *DeJesus Boria*, 518 F.2d 368, 370-71 (1st Cir. 1975).

[4] The Union challenges many of the findings of historical fact made by the administrative law judges and affirmed by the Board. We have carefully considered each of the Union's challenges and have, in each instance, concluded that the Board's findings are supported by substantial evidence and must be affirmed. *See NLRB* v. *Universal Packaging Corp.*, 361 F.2d 384 (1st Cir. 1966).

threatening Macal employees, on two separate occasions, with serious physical harm if they continued to work during a Union sponsored strike.[5] The Union maintains that none of these actions occurred under conditions in which they could constitute violations of § 8(b)(1)(A).

The assault on Macal's president occurred in Calderon's office on April 22, 1974, the day before a Union sponsored strike began. Although respondents concede that Grant's actions were reprehensible and violative of local law, they maintain that the admitted misconduct did not violate the Act because Grant did not have the required intent. They contend that the record clearly shows that the purpose of Grant's confrontation with Calderon was to force Macal to reinstate certain employees whom Grant mistakenly, but honestly, believed had been fired because of their Union sympathies and activities. In actuality, the employees had resigned. Respondents characterize Grant's actions as bona fide attempts to promote the § 7 rights of the former employees, and they maintain that such acts, as a matter of law, cannot form the basis for a § 8(b)(1)(A) violation. Secondly, respondents note that at the time of the assaults, there was no strike or other concerted activity in progress. They argue that ongoing concerted activity is a necessary condition for a § 8(b) violation because only then is there a possibility that the Union action will affect the exercise of § 7 rights. We find no merit in either contention.

Preliminarily, we observe that, although § 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce *employees* in the exercise of the rights

[5] The Board also found that the Union violated § 8(b)(1)(A) when, during a recess of the hearing before the administrative law judge, Grant threatened one of the employees with physical harm if he testified against the Union. Although respondents are precluded from challenging this determination by reason of their failure to object before the Board, *see* 29 U.S.C. § 161(e), we note that the evidence clearly supports the Board's findings and that the determination was legally correct. *See NLRB* v. *Dressmakers Joint Council*, 342 F.2d 988 (2d Cir. 1965).

guaranteed by § 7, threats directed against a non-employee can constitute a § 8(b) violation if they occur in contexts in which employees are likely to learn of them. *See NLRB* v. *Imparato Stevedoring Corp.*, 250 F.2d 297 (3d Cir. 1957); *NLRB* v. *Furriers Joint Council*, 224 F.2d 78 (2d Cir. 1955). The reason for this rule is clear. An employee might reasonably regard such threats as a reliable indicator of what would befall him if he were to refrain from joining concerted activity in support of the Union. *See Taxi Drivers Union*, 174 N.L.R.B. 1 (1969). In reviewing a Board determination that a labor organization's violent assault of a non-employee constituted unlawful restraint and coercion of employees, the question is whether there is substantial evidence that the coercive conduct was likely to discourage legislatively protected employee activity. Evidence of specific intent to restrain or coerce employees is not required. *See NLRB* v. *Local 140*, 233 F.2d 539, 541 (2d Cir. 1956).

With this background, both of respondent's contentions seem meritless. The mere fact that Grant may have perceived himself as promoting only the interests of certain employees who supported his Union does not eliminate the possibility that the violent and brutal assaults on Macal's president in his office would have had a coercive effect on any employees who wished to refrain from joining concerted activity on behalf of the Union. Indeed, the assault occurred under conditions in which one would expect it to influence the actions of employees. It took place at the Macal plant, suggesting to employees that they would not even be safe at work if they were to oppose the Union, and arose from a Union dispute with management. An employee who either observed the assault or learned of it thereafter may well have construed it as a signal of the Union's probable response to anyone who might oppose the Union's program.

Nor can the fact that a strike or other concerted activity

might not have been in progress at the time of the assault be conclusive of the absence of a likely coercive effect on protected activity. A strike was called the next day, and it is highly improbable that the violent assault would have been forgotten when the employees had to decide whether to join the strike. Under the circumstances, there was clearly sufficient evidence that the assaults were likely to chill the employees' exercise of their § 7 rights.

The Union also challenges the Board's conclusion that the threats directed against the Macal employees during the strike constituted violations of the Act. The first incident is a classic case of a § 8(b)(1)(A) violation. There Grant approached Jose Malabet and eight other Macal employees who were sitting in front of the plant waiting to go to work and repeatedly demanded that they not enter the plant. His final words illustrate the tone of his remarks: "This is Union Nacional and we kill people. So leave."[6] The second incident involved one Miguel Ortiz. Notwithstanding the Union's assertions, the Board was warranted in finding him an employee at the time of the incident. Although this was not nearly so flagrant as the first threat, it too involved a clear threat of bodily harm if an employee continued to report for work.

Respondents object to each of the Board's determinations on the ground that, insofar as the record shows, none of the individuals who were threatened were in fact coerced into honoring the strike. This argument misconceives the scope of § 8(b)(1)(A). As our earlier discussion indicates, it is not required that the victim of the Union misconduct actually refrain from exercising § 7 rights; indeed, the direct

[6] In challenging the factual premises of the Board's findings regarding the Malabet incident, respondents make much of the fact that Malabet's reply to a question of the General Counsel's was initially mistranslated. The record, however, reveals that Malabet was reexamined on this point, that the Union entered no objection, and in any event that any mistranslation was minor, given the substantial independent evidence.

victim need not be an employee. A violation is established if the natural tendency of the coercive misconduct is to deter the exercise of § 7 rights by the employees who either witness it or learn of it. *See NLRB* v. *Service Employees Int'l Union*, ... F.2d ...., ... (1st Cir. May 21, 1976) (Slip op. at 5); *cf. NLRB* v. *Int'l Woodworkers of America*, 243 F.2d 745, 746-47 (5th Cir. 1957).

No. 75-1375. Here the Board concluded that the Union through its agents Alcides Serrano and Elias Samuel Castro-Ramos, had violated § 8(b)(1)(A) by committing, in the presence of Jacobs employees, nine seperate violent assaults or coercive acts against individuals who opposed the Union's objectives at the Jacobs plant. The Union does not challenge the findings that Serrano committed each of the acts with which he is charged. Nor does it dispute that these acts, if undertaken by a Union agent, would constitute violations of § 8(b)(1)(A). However, they maintain that Serrano was not a Union agent and that there is no other theory on which it can be held responsible for any of Serrano's misconduct. With respect to the acts allegedly committed by the Union's admitted agent Castro, the Union argues that the Board's findings were not supported by substantial evidence, a contention which we summarily reject.

To review the Board's conclusion that the Union was responsible for Serrano's actions, it is necessary briefly to summarize the factual background of the case. Serrano was an employee at the Jacobs plant in March and early April of 1974. Beginning on April 2 of that year, he led a strike of Jacobs employees. After the strike began, Serrano arranged to have the Jacobs employees execute authorization cards on behalf of the Union. Castro, who is an organizer for the Union, testified that he was informed of the strike on April 1, the day before it began, and that the authorization cards had been passed out to the employees

sometime during the previous week. Castro arrived at the Jacobs plant sometime early in the day on April 2, after the strike had begun. Shortly after he arrived, he, Serrano, and three other employees met with Jacobs officials to demand that Jacobs recognize and bargain with the Union. At this meeting Serrano identified himself as a Union organizer and, after encountering resistance from a Jacobs official, threatened him with violence. Castro neither contradicted Serrano's assertion that he represented the Union nor reprimanded him for the threat. In the course of the meeting both Serrano and Castro referred to the fact that they had signed authorization cards from a majority of the Jacobs employees. Later that day, Serrano made similar statements regarding his Union affiliation in Castro's presence and again was not contradicted. He also threatened several other individuals with violence, and Castro, once again, made no attempt to disassociate the Union's efforts from the threats. In fact, Castro subsequently engaged in similar unlawful conduct.

At the hearing before the administrative law judge, Castro testified that Serrano was the Union's "contact" at the Jacobs plant and admitted that Serrano had played an identical role during the Catalytic strike of November of 1973, the strike which gave rise to the orders which we review in No. 75-1376. Significantly, in the Catalytic proceedings, the Union admitted that Serrano had been its agent. Although this admission is not conclusive for present purposes, it is highly relevant.

On this record, we are satisfied that the Board properly held that the Union was responsible for all of Serrano's misconduct. Although Serrano was not an offic[illegible] employee of the Union and although there is no evidence that he was ever formally appointed a Union agent, we think there was enough circumstantial evidence of an agency

relationship to warrant the Board's conclusion. Serrano's status as a Union "contact", the admitted agency relationship at Catalytic, the organizational activities on behalf of the Union, the fact that the organizational activities were closely coordinated with Castro's and apparently done with his knowledge, Castro's presumed power to appoint subagents to aid the Union's organizational activities, *see White Oak* v. *UMW*, 318 F.2d 591, 599-600 (6th Cir. 1963), and Castro's acquiescence in Serrano's assertion that he was a Union organizer, all provide circumstantial evidence from which reasoning minds could infer that Serrano was acting on behalf of the Union. *See NLRB* v. *Int'l Longshoremen's and Warehousemen's Union*, 420 F.2d 957, 959 (9th Cir. 1969); *Schauffler* v. *Highway Truck Drivers & Helpers*, 300 F.2d 317, 319-20 (2d Cir. 1962). We, therefore, uphold the conclusion that the Union and Serrano violated § 8(b)(1)(A).[7]

No. 75-1376. Here the Board found that the Union and the Comite had, in the course of a labor dispute with Catalytic, flagrantly and repeatedly violated both § 8(b)(1)(A) and § 8(b)(4)(i) and (ii) (B). At the time of the incidents in question, Catalytic was performing construction work on the Merck premises, and it was the interference with Merck's operation which gave rise to the violations of the prohibition against secondary boycotts. Before the Board, neither the Union nor the Comite presented any defense to

[7] Even if there were no agency relationship, we note that the Union would have been responsible for much, if not all, of Serrano's misconduct. Serrano's first unlawful acts occurred in Castro's presence and under circumstances in which they were associated with the Union's efforts at the plant. Castro not only made no effort to disapprove Serrano's conduct; he engaged in similar misconduct himself. Since the Union was aware of its "contact's" unlawful activities on its behalf and made no attempt to discourage it, the Union's silent, if not direct, approbation renders it responsible for all of Serrano's similar, subsequent misconduct. *See NLRB* v. *Bulletin Co.*, 443 F.2d 863, 867 (3rd Cir. 1971); *National Cash Register* v. *NLRB*, 466 F.2d 945, 961 (6th Cir. 1974). *Compare NLRB* v. *Service Employees Int'l Union, supra*, ... F.2d at .... (Slip op. at 5-7).

the charges, and both parties now concede that they are precluded from challenging the Board's substantive conclusions. We, therefore, need not discuss the substantive issues in this case any further.

No. 75-1374. Because this case presents the issues which we find the most troublesome, we will state the factual background in somewhat greater detail. Following a Board election, the Union was certified as the exclusive bargaining representative of certain Carborundum employees on May 22, 1974. Thereafter, the Union and Carborundum held a series of bargaining sessions for the purpose of negotiating a collective bargaining agreement. At the last negotiating session, which occurred on August 22, 1974, Carborundum submitted what it characterized its final contract proposal. Union President Grant stated that the proposal was not satisfactory and that it would be submitted to the membership with a negative recommendation. Grant then said the conference should end because he was at the point of starting a fight, and he ordered an employee member of the Union negotiating committee to cease talking because Grant was about to start slapping people. Carborundum's representative then left the session because "things [were] getting bad [there]."

The parties subsequently made arrangements for a further bargaining session to be held on September 18 at the San Juan offices of the Department of Labor. No meeting, however, was held because of the events of September 17. On the morning of that date, shortly before the beginning of the working hours, Grant and three other Union agents appeared at the Carborundum plant for the ostensible purpose of making arrangements for transportation to the next day's bargaining session. When a Carborundum supervisor, Ortiz Cano, observed the four men talking to an employee, Jenaro Rosario, the supervisor told the Union

agents that unless they had permission they were not permitted at the plant when the office personnel were not there. At that point the four Union agents followed the supervisor into an adjoining production control room and beat him to the floor. The Union agents then approached Rosario again. In their earlier conversation, they had asked him whether he had been collecting signatures for a Union deauthorization petition, and he had given a noncommittal answer. When they returned to Rosario, the Union agents held him and slapped him. As they left, they made the comment, "This one we are about to kill."

Because of the unprovoked violent attacks on its employees, the Carborundum representatives did not appear at the bargaining session scheduled for September 18. On the 19th, the four Union agents again entered the plant, ignoring the plant guard's protest in doing so. When inside, they approached a responsible official and inquired why Carborundum's representatives had not attended the bargaining session. They were informed that there would be no further bargaining until the violence ended. The Union agents then left the plant. Finding that 40 to 50 employees were on their lunch breaks, Grant addressed them with a loudspeaker. In the course of a five to ten minute speech, he stated that Carborundum was refusing to negotiate, that the Union would compel them to do so, and that, if Carborundum were closing the gates, it was useless because the Union could knock them down.

On these facts the Board found that the Union had violated § 8(b)(1)(A) by threatening physical violence at the August 22 bargaining session, physically attacking two employees and threatening to kill Rosario on September 17, and threatening to break down the gates of the Carborundum plant on September 19. The Board dismissed the Union's complaint that Carborundum's refusal to bargain

violated § 8(a)(5), reasoning that the Union's violent misconduct and failure to give adequate assurances that it would cease excused the employer from any obligation to bargain. Finally, in a technically separate proceeding, the Board revoked the Union's certificate of representation. The Union attempts to challenge each of these actions, but at this point we will consider only the Board's conclusion that § 8(b)(1)(A) was violated.

To take the most flagrant charge first, there is no question but that the attacks on Supervisor Ortiz and employee Rosario and the threat against Rosario's life constituted coercive conduct violative of § 8(b). Since the attacks and threats against Rosario followed an accusation that Rosario was seeking to decertify the Union, it is hard to conceive of a clearer example of coercive interference with an employee's § 7 right to oppose representation by a given labor organization. *See General Truck Drivers* v. *NLRB*, 410 F.2d 1344, 1346-47 (5th Cir. 1969). The unprovoked violent attack against Supervisor Ortiz also violated § 8(b)(1)(A) since it occurred in Rosario's presence and since the natural consequence of it would be further to impress upon him what might befall him if he continued to oppose the Union. *See NLRB* v. *Int'l Woodworkers of America, supra*, 243 F.2d at 746-47; *NLRB* v. *Local 140, supra*, 233 F.2d at 541.

The other incidents present more difficult problems. The statements Grant made during the August 22 bargaining session did threaten violence. Employees could have interpreted the remarks as indicating what might befall them in the event that they opposed the Union's position on any bargaining issue. Although we recognize that employees might not have perceived Grant's remarks as threatening, *cf. NLRB* v. *Teamsters Local 745*, 462 F.2d 201, 203 (5th Cir. 1972), the Board's contrary conclusion is plainly supported by substantial evidence.

More troublesome is the determination that it was a § 8(b) violation for Grant to state, in the course of a five to ten minute speech to the employees, that the Union would tear down the gates if Carborundum closed them and that not even the police could stop the Union. We recognize that destruction of an employer's property can restrain the exercise of § 7 rights by threatening employees' jobs and by creating a general atmosphere of fear and violence, *see New Power Wire & Electrical Co.* v. *NLRB*, 340 F.2d 71, 72 n. 1 (2d Cir. 1965); *NLRB* v. *UMW, supra*, 429 F.2d at 147-48, and there may also be situations in which threatening such destruction could violate § 8(b)(1)(A) either by impressing upon employees the risks they would run if they were to oppose the Union or by threatening the employees' jobs. Here, however, we find it impossible to believe that Grant's statements would have been so interpreted. The remarks were made in the course of a rather long speech in which Grant attacked the company for refusing to bargain and in which he requested employee solidarity in the face of the company's perceived intransigence. The statements — which were directed at the gates, not the plant or any integral part of its operations — would themselves be relevant only in the event of a lockout. Significantly, a lockout neither had been threatened nor seemed likely at the time of the speech. In context, the threats, which were temporally remote from earlier illegalities and dealt with different subject matters, were hyperbole, with at most metaphorical significance.

Such speech should not lightly be subjected to sanction. *See generally Letter Carriers* v. *Austin*, 418 U.S. 264, 270-78 (1974). A Union's interest in communicating its views to its membership and pleading for a united front is an important one and should not unnecessarily be restricted. We observe that such communication is not always likely to be

parlor discourse. We recognize that there may be occasions where such speech, not improper if viewed in isolation, may be so temporally or thematically associated with previous unlawful acts that it may be viewed as coercive conduct. But there was no persuasive showing here that Grant's speech was likely to have had a coercive effect on the employees' exercise of their § 7 rights. We therefore modify the Board's order in No. 75-1374 to exclude any reference to Union threats to damage Carborundum's property.

II. Remedial Issues

The Broad Orders. The Union challenges the Board's imposition of orders which require it to cease and desist not only from the specific unfair labor practices it was found to have committed but also from "in any manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act." We are satisfied that the imposition of these broad orders was entirely proper under the circumstances. It is well established that, when a record discloses persistent attempts to interfere with legislatively protected rights by varying methods, the Board may restrain a labor organization from committing similar or related unlawful acts in the future. *See NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 436-38 (1941); *NLRB* v. *Local 476*, 280 F.2d 441, 443 (1st Cir. 1963). The record in these cases amply supports the Board's conclusions that the Union has demonstrated a proclivity to violate the § 7 rights of employees. The Union not only has been found to have committed numerous violations of § 8(b)(1)(A) in five separate cases.[8] Its agents have stated, both in the course of their unlawful activities and in the hearings before the Board, that they do not regard themselves as

[8] In addition to the unfair labor practices from the four cases we review today, the Board also noted that the Union had been found to have violated § 8(b)(1)(A) in *Union Nacional de Trabajadores and its Agent Radames Acosta-Cepeda (Surgical Applicances Mfg., Inc.)*, 203 N.L.R.B. No. 106 (1973).

subject to the authority of the Act and that they feel no obligation to conform their conduct to its requirements.[9]

The Mailing and Publication Requirements. Secondly, the Union challenges each order's requirement that copies of the notices be mailed to each employee of the companies involved and be published in all Puerto Rican newspapers of general circulation. We reject these challenges. The Board clearly has the power to fashion its orders in a manner that will ensure that their contents are communicated to all employees whose rights are affected. Widespread communication is aimed at counteracting the coercive effects of the § 8(b)(1)(A) violations. *See Texas Gulf Sulphur Co.* v. *NLRB*, 463 F.2d 778, 779 (5th Cir. 1972); *J.P. Stevens & Co.* v. *NLRB*, 461 F.2d 490, 495 (4th Cir. 1972). Here, where many of the victims of the unfair Union activities were not Union members, the remedy of ordering merely that copies of the notices be posted at the Union offices and meeting places would plainly be inadequate. The mailing requirement is an appropriate device to help insure that the victims of the Union's wrongdoing learn of the Board's actions.

The further requirement that the notices be published in all newspapers of general circulation helps insure that all interested persons will receive notice. *See Alexander Stafford Corp.*, 118 N.L.R.B. 79, 82 (1957), *enf'd sub. nom. Int'l Ass'n of Heat & Frost Insulators* v. *NLRB*, 254 F.2d 955 (D.C. Cir. 1958). Moreover, where the violations are flagrant and repeated, the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal

[9] We summarily reject the Union's argument that § 8(b)(1)(A) of the Act is unconstitutionally vague. We also reject its contention that the broad orders were unlawful because the General Counsel did not give them notice that he would seek broad orders. Even assuming, *arguendo*, that notice is required and was not given here, the Union could not have been prejudiced by any failure to receive it. The broad orders were predicated upon the Board's findings in the other unfair labor practice proceedings, and these findings could not have been attacked.

activity by letting in "a warming wind of information and, more important, reassurance." *J. P. Stevens & Co.* v. *NLRB*, *supra*, 417 F.2d at 538-40. These orders are well within the Board's broad discretion to fashion remedies that will effectuate the policies of the Act. *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).

The Decertification Order. This brings us to the single most troublesome issue in this case: the propriety of the Board's decertification of the Union as the Carborundum employees' collective bargaining representative and the related question whether it was proper to dismiss the Union's § 8(a)(5) complaint against Carborundum. The Board claims that we lack jurisdiction to review either order. Although we conclude that the Board is technically correct on both points, we will express our general views on the propriety of the decertification order to provide guidance in the event that the Union is able to challenge the decertification order in a subsequent proceeding.

There is no escaping the fact that we lack jurisdiction to review the Board's dismissal of the § 8(a)(5) complaint. The present consolidated proceeding was instituted by the Board pursuant to § 10(e) of the Act, 29 U.S.C. § 160(e), to obtain enforcement of its orders in these four unfair labor practice proceedings. The Union did not file a petition under § 10(f), 29 U.S.C. § 160(f), for review of the unfavorable termination of its § 8(a)(5) complaint. We have held that the exclusive means for a losing party to obtain judicial review of an unfavorable unfair labor practice determination is to file a petition for review under § 10(f) of the Act. *NLRB* v. *Oil, Chemical and Atomic Workers*, 476 F.2d 1031, 1033-34 (1st Cir. 1973). The fact that the losing party is a defendant in an enforcement proceeding involving a related unfair labor practice determination does not place the

Board's unfavorable ruling before the court. *Id; cf. Spound* v. *Mohasco Industries, Inc.*, ... F.2d .... (1st Cir. April 16, 1976) (Slip op. at 10-11).

The Board contends that the Union's failure to seek appellate review of the Board's dismissal of the § 8(a)(5) complaint also precludes it from obtaining review of the Board's order revoking the Union's certificate as a collective bargaining representative. It reasons that a decision by the Board in a representation proceeding under § 9 of the Act is not a reviewable final order under § 10, *see A.F. of L.* v. *Labor Board*, 308 U.S. 401, 409-12 (1940), and that such an order becomes reviewable only when it is the predicate for a Board decision in an unfair labor practice proceeding. *Id.* Since the decertification order does not appear to have been the premise for the Board's dismissal of the Union's § 8(a)(5) complaint, it is doubtful that the union could have obtained review of the revocation order by appealing the dismissal of its unfair labor practice complaint.[10] But that point need not concern us. Since the Union did not appeal the dismissal of its § 8(a)(5) complaint and since the decertification order did not serve as the predicate for any of the final orders we review today, we are presently without jurisdiction to review the revocation of the Union's decertification.

It is possible, however, that the Union could obtain appellate review of the revocation order by filing a second § 8(a)(5) complaint and filing a § 10(f) petition for review of the ultimate dismissal thereof. *See* Meltzer, *the NLRA and Racial Discrimination: The More Remedies, The Better,*

[10] The Board dismissed the Union's complaint not because the Union's certificate had been revoked but rather because, at the time of the refusal to bargain, the Union had engaged in violent misconduct which excused the employer from his duty to bargain and had not provided the employer with adequate assurances that the violent misconduct would not recur. Under the Board's theory of reviewability, therefore, it does not seem that an appeal of the dismissal of this § 8(a)(5) complaint would have placed the decertification order before this court.

42 U. Chi. L. Rev. 1, 21 n .102 (1974). Since decertification under the circumstances of this case strikes us as somewhat novel and since the Board's order implicates issues that were not explicitly addressed by the Board, we think it useful to state our thoughts and concerns and thereby provide the Board with guidance in the event the case comes before it again.

Both the courts of appeals and the Board have recognized that there are circumstances in which it is appropriate either to refuse to certify or to revoke the certification of a Union that, presumptively at least, enjoys the support of the majority of the employees in an appropriate bargaining unit. *See, e.g., NLRB* v. *David Buttrick Co.*, 361 F.2d 300 (1st Cir. 1966); *Int'l Brotherhood of Teamsters, Local No. 671*, 199 N.L.R.B. 994 (1972); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953); *cf. NLRB* v. *Mansion House Center Management*, 473 F.2d 471 (8th Cir. 1973). Although the Board's authority to take such action is plainly not unlimited, *see Leedom* v. *Int'l Union*, 352 U.S. 145 (1956), we agree that the Board may deny representational status to a Union which has breached its obligations to represent the best interests of its constituents, *see Catalytic Industrial Maintenance Co.*, 209 N.L.R.B. No. 101 (1974), or which has a relationship with a third party that may preclude the establishment of a normal bargaining relationship with the employer. *See NLRB* v. *David Buttrick Co., supra; Medical Foundation*, 193 N.L.R.B. 62, 64 n. 19 (1971); *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555, 1559 (1954).

None of these cases clearly establish that the Board may decertify a Union that engages in serious violent misconduct in the course of collective bargaining and which attempts to coerce the employees in the unit to refrain from seeking

the Union's decertification.[11] We note that there are alternative means of attempting to control such conduct. Insofar as such misconduct affects the bargaining process, the normal remedial measure would be to refuse to enter a bargaining order on behalf of the Union until such time as the Union provides adequate assurances that there will be no repetition of the violent and coercive conduct. *See Cascade Corp.*, 192 N.L.R.B. 533, 534 n. 2 (1971). Insofar as it interferes with the employees' § 7 rights, the normal corrective action would be § 8(b)(1)(A) measures. Nevertheless, given that the overriding purpose of the Act is the promotion of industrial peace, we decline to take the position that the Board does not, in some cases at least, have the implied authority under § 9 to deny representational status to an elected Union that has engaged in violent misconduct so aggravated as to preclude the maintenance of normal collective bargaining relationships. Because of the important interests that are at stake, however, we think that a decertification order is an extreme measure and should be entered only when the Board has first demonstrated that there are no equally effective alternative means of promoting the objectives of the Act. *Cf. Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946).

The value at stake, of course, is the interest of a majority of the Carborundum employees to be represented by their duly selected collective bargaining representative. Here, where the Union has been selected the representative after a representation election, the employees have supplied the

[11] Here the Union notes that the decertification occurred less than one year after the Board sponsored election, and it argues that the Board's "one year rule", *see Brooks* v. *NLRB*, 348 U.S. 96 (1954), precluded the revocation of its certificate. This contention is meritless. The one year rule has never been conceived of as affording the elected Union an absolute right to serve as collective bargaining representative until 365 days have passed. *See id.* at 98-99. It was not intended to protect the representational status of a labor organization that had violated its obligations as a bargaining representative and frustrated the collective bargaining process.

most reliable evidence of their desire to be represented by a particular labor organization. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 602-03 (1969). Before taking action that nullifies, even temporarily, the results of the election, we think that the Board should take steps to assure itself and a reviewing court that the action is necessary to protect the collective bargaining and representational processes themselves.[12] It should explicitly find that no alternative remedy — either § 8(b)(1)(A) remedies or an order delaying bargaining until the Union provides adequate assurances that the misconduct will not recur — will be an equally effective means of protecting the values of the Act.

The Board stated the grounds for its decision to revoke the Union's certification in these words:

> "This labor organization, by its brutal and unprovoked physical violence in this case and by its extensive record of similar aggravated misconduct . . . has evinced an intent to bypass the peaceful methods of collective bargaining contemplated in the Act. . . . It has consistently exhibited an utter disregard for the orderly and lawful processes available under the Act, and instead deliberately resorted to self-help through violence. . . .
>
> . . . we cannot continue to certify as a qualified bar-

[12] It is the fact that an election has been held which distinguishes the case at bar from cases such as *Laura Modes*, 144 N.L.R.B. 1592 (1963) and *NLRB* v. *World Carpets of New York, Inc.*, 463 F.2d 57, 62 (2d Cir. 1972), which hold that a Union which has engaged in coercive misconduct, comparable to the employer's, has forfeited its claim to the bargaining order to which it would otherwise normally be entitled under *NLRB* v. *Gissell Packing Co.*, *supra*. In this line of cases, the Union's sole claim to representational status arises from possessing a card majority, a fact which, in the absence of employer misconduct, would entitle it only to petition for an election. *See Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974). When the Union has been selected bargaining representative after an election — "a solemn and costly occasion, conducted under safeguards [ensuring] voluntary choice", *Brooks* v. *NLRB*, 348 U.S. 96, 99 (1954) — there is a clear interest in having the results respected and in avoiding the cost and inconvenience of further representational proceedings. Absent some showing of reasonable necessity, nullification of the election results would not seem proper.

> gaining representative a labor organization such as Respondent Union which does not lawfully pursue its representation rights and is openly defiant of the authority of the Board and the teachings and purposes of the Act. Due to the atmosphere of fear and coercion generated by the Union's unlawful conduct, no constructive bargaining on behalf of the employees it represents is feasible. Thus, the Union has corrupted and frustrated the representative scheme of bargaining envisaged by the Act. . . ."

Although, if we were actually reviewing this decision, we might read into it an implied rejection of the efficacy of less drastic approaches, we would do so because of our awareness of the absence of any forewarning of our concerns. In the present jurisdictional posture of this case, we have assumed the privilege of exposing our apprehension — without immediate effect — that the Board's approach may be breaking new ground with insufficient sensitivity expressed on the record to the interests at stake.

Here, the Board did not explicitly engage in any assessment of the adequacy of any alternative means of securing a return to normal collective bargaining. Moreover, a principal factor in the Board's decision apparently was its belief that revoking the Union's certificate would be an effective means of remedying the pervasive and flagrant misconduct of the Union at other Puerto Rican jobsites. But a desire to punish misconduct that occurred at unrelated locations would not be a permissible basis for revoking the Union's certification. What is at stake is not only the interest of the Union but also the interest of the employees at the Carborundum plant to be represented by the Union of their choice. The protection of this interest requires that the sole permissible objective in revoking a Union's certification is to promote normal representation and collective bargaining at the Carborundum plant itself. Union misconduct at unrelated jobsites is relevant only to determine whether alternative measures short of decertification would be equally effective means of promoting the objectives of the Act.

If this case were to come before the Board again, we suggest it address the following issues. First, it should consider the effect of the Union's misconduct *at the Carborundum plant* on the operation of the representational and collective bargaining processes. If it finds that constructive bargaining is not feasible, it should then consider whether the objectives of the Act could be promoted equally well either by an order excusing the employer of his bargaining obligations until the Union has provided adequate assurances that the misconduct will not recur or by normal § 8(b)(1)(A) remedies. At this point, it will be proper to consider the evidence of the Union proclivity for unlawful conduct since it is relevant as to the likelihood that less drastic measures will be effective. We emphasize that, because of the important employee interests that are at stake, the focus should be on promoting peaceful collective bargaining and not on fashioning sanctions to deter Union misconduct. We recognize that the two may often be hard to separate.

We do not suggest that a decertification order was unwarranted on this record. Nor do we wish to encourage the Union to institute further proceedings. Were we actually called upon to review a decertification order in this or a similar case, we naturally would give the usual deference to the Board's application of the correct remedial criteria to the facts before it. *See Fireboard Paper Products Corp. v. NLRB, supra* at 216. We note that a Union which has threatened the members of the employer's bargaining team, which seeks to retain its majority status by terrorizing the

opposition rather than by serving as an effective bargaining representative, and which has a long history of flagrant misconduct is an apt candidate for having its certification revoked. Here, we state our views solely for the purpose of stating the concerns the Board should address on the record in such cases.

• • • •

We grant enforcement of the Board's orders in each of the *four cases, except that in No. 75-1374, the Board's order is modified to exclude any references to the threats directed at Carborundum's gates.*

CAMPBELL, *Circuit Judge.* (concurring and dissenting) I concur in so much of the court's opinion as affirms the Board's disposition, but I dissent from the court's modification in 75-1374 excluding the Board's inclusion of the threats made on September 19. In the give and take of labor negotiations, language of the sort used by Grant might normally be taken only as hyperbole. Given, however, Grant's previous resort to threats and — just two days earlier — to violence within the plant, I think the Board could reasonably and properly interpret statements that the Union would tear down the gates and that not even the police could stop it as conveying a coercive threat. It was plain by the nineteenth that when Grant threatened violence, he was not simply being poetic. I can well understand my colleagues' concern not to chill speech. However, the values associated with collective bargaining under the National Labor Relations Act, as well as with the first amendment itself, cannot endure in an atmosphere of threats

and violence; and I see nothing excessive in the Board's reaction here.

I agree with the court that we are without jurisdiction to review the decertification order, and I therefore disassociate myself from the last part of the opinion, where the court puts foward certain "thoughts and concerns" as to decertification. Doubtless there are occasions when it is appropriate for a court to offer prospective guidance to an administrative agency — for example, when remanding for further proceedings. But I think the practice is questionable with respect to a matter as to which we are now without jurisdiction. No one can deny that decertification is a serious step, but precisely because the considerations are delicate, it seems preferable to avoid advisory statements.

Adm. Office, U. S. Courts — Thayer-Dearing Company Legal Printers Boston

No. 76-410

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNION NACIONAL DE TRABAJADORES, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 152a-176a) is reported at 540 F. 2d 1. The decisions and orders of the National Labor Relations Board (Pet. App. 9a-151a) are reported at 219 NLRB 405, 414, 429, and 862.

JURISDICTION

The decision of the court of appeals was entered on June 21, 1976 (Pet. App. 153a). The petition for a writ of certiorari was filed on Monday, September

20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's remedial orders were reasonable and proper.

2. Whether the court of appeals lacked jurisdiction to review the Board's revocation of the Union's certification.

3. Whether the Board's procedure with respect to the use of the Spanish language in hearings conducted in Puerto Rico violates the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, as amended, 29 U.S.C. 151, *et seq.*) are set out at pages 2a-7a of the petition. Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f), are set out in Appendix, *infra* at pages 1a-3a.

STATEMENT

During 1973 and 1974 a series of unfair labor practice charges were filed against Union Nacional de Trabajadores ("the Union") and several of its agents alleging a wide range of activities violative of Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A).[1] Four separate complaints were issued by

[1] In one case, the Union also was charged with violating the secondary boycott provisions of the Act, Section 8(b)(4)(i), (ii)(B), 29 U.S.C. 158(b)(4)(i), (ii)(B) The petition does not concern this charge (Pet. 6, n. 5).

the Regional Director for the National Labor Relations Board; each was tried separately before different Administrative Law Judges of the Board. The hearings were conducted in English; the testimony of non-English speaking witnesses was translated. In each case the Board found that the Union had violated Section 8(b)(1)(A) of the Act and recommended the issuance of a broad remedial order.

Thus, in the *Macal* case,[2] the Board found that the Union, through its agents, had violently assaulted the company's president in his office (Pet. App. 23a); threatened one employee with death (Pet. App. 18a); intimidated four or five other employees who were attempting to work while the Union was striking (Pet. App. 14a-15a, 18a-19a); and threatened an employee because his testimony at the unfair labor practice hearing was detrimental to the Union (Pet. App. 15a). In the *Carborundum* case, the Board found that Union agents had threatened the company's negotiators with physical violence at a collective bargaining session (Pet. App. 33a-36a); entered the plant and beat up a company supervisor and an employee, and had threatened to kill that employee (Pet. App. 36a-41a, 60a); and threatened to break down the company gates (Pet. App. 41a-43a, 61a). In the *Jacobs* case, the Board found that Union agents threatened, assaulted, offered to fight with,

[2] As was the procedure below, the cases will be discussed under the name of the party filing charges against the Union.

and inflicted damage upon the property of three company supervisors (Pet. App. 77a-78a); threatened and assaulted suppliers and persons conducting business with the company during a strike called by the Union; and gathered eight to twelve people armed with pipes and sticks on two separate occasions to prevent employees from working during the strike (Pet. App. 72a-74a). Finally, in the *Merck-Catalytic* case, the Board found that the Union had engaged in mass picketing and blocking tactics to prevent ingress and egress to the Merck-Catalytic premises, including threats to inflict and the actual infliction of physical injury and property damage upon the employees of Catalytic and at least four other employers, for the purpose of compelling employees to honor the Union's picket line and engage in a secondary boycott against Catalytic (Pet. App. 105a-114a).[3]

Based upon these findings, and its prior findings of violent unlawful conduct in *Union Nacional de Trabajadores (Surgical Appliances Mfg. Inc.)*, 203

[3] For 15 days, 39 Merck employees were forced to remain inside of the plant because of the Union's violent tactics and refusal to allow them to leave the plant (Pet. App. 109a). During the strike, several supervisors and plant guards of Merck and Catalytic were threatened with death; suppliers of Catalytic and non-strikers were threatened with and subjected to physical violence and property damage (Pet. App. 105a, 114a); and, when non-striking employees finally formed caravans to protect themselves while crossing the picket line, the Union assembled groups of strikers armed with pipes, clubs, and electrical cable to break up the caravans (Pet. App. 113a-114a).

NLRB 106,[4] the Board issued broad remedial orders requiring the Union and its agents to cease and desist not only from the unfair labor practices found, but also from "in any other manner restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act" (Pet. App. 21a, 25a, 65a, 89a-90a, 92a, 95a-96a, 126a, 134a). The Union was also required to post at its offices and meeting places notices prescribed by the Board; to mail signed copies of such notices to the Board's Regional Director, for mailing to the employees of the companies involved; and to place the notices in all newspapers of general distribution published in Puerto Rico (Pet. App. 26a, 65a-66a, 96a, 136a).

In addition to these remedial orders, the Board utilized its decertification authority in response to a petition by the Carborundum company. The Board consolidated the company's petition to revoke the Union's certification for consideration with the unfair labor practice complaint against the Union under Section 8(b)(1)(A) and a Section 8(a)(5) unfair labor practice complaint against Carborundum for refusal to bargain (Pet. App. 58a, n. 1).[5] In its

[4] In that case, the Board found that the Union violated Section 8(b)(1)(A) by throwing stones at non-strikers crossing its picket line and thus blocking their access to the plant; assaulting a non-striker seeking access to the plant; and pouring coffee upon a supervisor and assaulting the company president and his wife.

[5] The Board sustained the Section 8(b)(1)(A) complaint, but dismissed the Section 8(a)(5) complaint (Pet. App. 61a-62a, 66a).

decision in the *Carborundum* case, the Board revoked the Union's certification because the Union "corrupted and frustrated the representative scheme of bargaining envisaged by the Act," making it impossible for it to conduct collective bargaining negotiations on behalf of the employees it represented (Pet. App. 63a-64a). The right to invoke the statutory recognition procedures was withdrawn until "the employees are able to demonstrate their desires anew in an atmosphere free of coercion * * *" (Pet. App. 64a).

The Board moved pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e), to obtain court of appeals enforcement of its remedial orders in the unfair labor practice proceedings. However, the Union did not file a petition for appellate review under Section 10 (f), 29 U.S.C. 160(f), of the dismissal of the refusal to bargain complaint against Carborundum.

With one minor modification (Pet. App. 152a-176a),[6] the court of appeals enforced the Board's orders. The court held that "the imposition of these broad orders was entirely proper under the circumstances" (Pet. App. 166a). It explained (*id.* at 166a-167a):

> It is well established that, when a record discloses persistent attempts to interfere with legislatively protected rights by varying methods, the Board may restrain a labor organization from committing similar or related unlawful acts in

[6] The court (one judge dissenting) found that the Union's assertion in *Carborundum* that it would break down the company's gates was, in context, not threatening (Pet. App. 165a).

> the future. The record in these cases amply supports the Board's conclusions that the Union has demonstrated a proclivity to violate the § 7 right of employees. The Union not only has been found to have committed numerous violations of § 8(b)(1)(A) in five separate cases. Its agents have stated, both in the course of their unlawful activities and in the hearings before the Board, that they do not regard themselves as subject to the authority of the Act and that they feel no obligation to conform their conduct to its requirements. [Footnotes and citations omitted.]

The court further approved the Board's mailing and publication requirements. It pointed out that, since many of the victims of the unlawful Union activities were not Union members, merely ordering that copies of the notices be posted at the Union offices and meeting places "would plainly be inadequate" (Pet. App. 167a). Similarly, the court stated that where, as here, "the violations are flagrant and repeated," newspaper publication would not only assure adequate notice but also neutralize the effects of "persistant illegal activity" (*id.* at 167a-168a).

Petitioners attempted to use the appellate proceeding seeking enforcement of the Board's remedial orders to challenge the Board's action in revoking the Union's certification; however, the court held that it had no jurisdiction to review the Board's decertification order (Pet. App. 168a). The court of appeals noted that petitioners had not yet utilized the possible avenue for review provided by a Section 8(a)(5) complaint and a Section 10(f) petition for

review and that the decertification order was not a predicate for any of the remedial orders for which enforcement was sought. Citing *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, the court explained that, "since the decertification order did not serve as the predicate for any of the final orders we review today, we are presently without jurisdiction to review the revocation of the Union's" certification (Pet. App. 169a).

ARGUMENT

1. Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to order the violator to cease and desist and "to take such affirmative action * * * as will effectuate the policies of [the] Act." In *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433, this Court held that Section 10(c) of the Act does not confer on the Board general authority to restrain unlawful practices which it has not yet found to have occurred. However, where past unlawful conduct raises the danger of future violations, effective preventive orders are proper. The Court stated (*id.* at 436-437):

> The breadth of the order * * * must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed * * * in the past. * * * To justify an order

> restraining other violations it must appear that * * * danger of their commission in the future is to be anticipated from the course of [unlawful] conduct in the past.

The courts of appeals, accordingly, have held that Board orders are properly drawn to prohibit the charged party from "in any other manner" restraining or coercing employees in the exercise of their statutory rights where that party has demonstrated "a proclivity to violate the Act" (*Southwire Company* v. *National Labor Relations Board*, 383 F. 2d 235, 237 (C.A. 5)), or where it has "an attitude of opposition to the purposes of the Act generally" (*National Labor Relations Board* v. *Moore Dry Kiln Co.*, 320 F. 2d 30, 35 (C.A. 5)). See also *Allegheny Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 312 F. 2d 529, 532 (C.A. 3); *Central Mercedita, Inc.* v. *National Labor Relations Board*, 288 F. 2d 809, 812 (C.A. 1). Similarly, orders restraining violations directed at employees of other than the named employers are appropriate where the facts show an intention to direct an unlawful campaign more broadly than just at the immediately involved employers. See, *e.g.*, *National Labor Relations Board* v. *Local 25, I.B.E.W.*, 383 F. 2d 449, 454-455 (C.A. 2).

Under these principles, the Board's orders here were entirely justified.[7] As the court below noted

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[7] Petitioners assert (Pet. 34-36) that a respondent is entitled to notice that the Board's General Counsel intends to seek broad remedial orders. Petitioners were aware from the complaints that they were charged with widespread miscon-

(Pet. App. 166a-167a), Union agents, in the course of committing illegal acts and later at the Board hearings, expressed their intention to continue to engage in such illegal conduct, regardless of what injunctions or restraining orders were placed upon the Union or them. Moreover, in five separate unfair labor practice proceedings, the Union was found to have engaged in a campaign of violence and harassment to achieve its ends which included blocking ingress and egress to and from struck plants; mass picketing; and threatening and actually committing physical violence, property damage, and other reprisals against management officials, supervisors, and employees of the struck companies. Such conduct fully supports the Board's factual findings, upheld by the court below, that there was reason to believe that the Union intended to continue its unlawful conduct.[8]

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duct. Moreover, they were aware during the hearings that the General Counsel and/or the charging parties sought extraordinary remedial relief. See Pet. App. 101a-102a, 120a-121a; *Carborundum* Tr. 12-13, 251-253, 256-260; *Jacobs* Tr. 194; *Macal* Tr. 74-81, 175, 179-184.

[8] Thus, contrary to petitioners' claim, there was obviously more in this record than a mere finding that the Union had engaged in "similar conduct" (Pet. 32). Accordingly, this case differs significantly from *San Francisco Local Joint Exec. Bd. of Culinary Wkrs.* v. *National Labor Relations Board*, 501 F. 2d 794, 801-802 (C.A. D.C.), on which petitioners rely (Pet. 27-33). There the court, in a case involving picketing in violation of Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C), struck down an order which prohibited picketing directed at

Petitioners claim that the Board's order implicates First Amendment values because it was based on the Union's opposition to the Board's jurisdiction (Pet. 43-45) and because its broad language chills their future rights to organize (Pet. 37-42). Neither claim has factual support. The credited evidence does not show that the Union's refusal to obey the law was based upon a belief that the Board lacks authority in Puerto Rico, but rather on its belief that "the laws * * * in this country [should] be applied in a manner favorable to the workers and when they cannot be they should be violated" (Pet. App. 63a, n. 6, 87a-88a). More importantly, the remedial order was not founded upon the expression of opposition to Board jurisdiction, but rather on the history of violent conduct and the clear intention not to obey the law. Petitioners' overbreath argument is similarly unpersuasive. The order merely tracks the language of Section 8(b)(1)(A) of the Act in prohibiting petitioners from "restrain[ing] or coerc[ing] employees in the exercise of the rights guaranteed in section 7 of the Act." The fact that the order prohibits not only the unlawful acts which have occurred but violations of the Section 7 guarantees "in any other manner" adds nothing to the simple prohibition against violating the Act. Petitioners' complaint is merely that it would "be broad enough to cover any

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employers other than the employers immediately involved. The court found no substantial evidence to support the Board's view that the union's conduct demonstrated a " 'generalized scheme' to violate the Act." As shown, there is substantial evidence of such an intent here.

possible violation of Section 8(b)(1)(A) which might occur in the future" (Pet. 37). In the absence of a claim, not made here, that the language of Section 8(b)(1)(A) of the Act is itself unconstitutionally vague, there is no basis for challenging the constitutional validity of the remedial order.

Nor is there merit to petitioners' objections (Pet. 46-48) to the Board's mailing and publication requirements. The courts have recognized that requiring communication to employees of the contents of Board notices by means other than posting at the plant or the union's offices is appropriate if necessary to eliminate the coercive impact of unfair labor practices.[9] As the court below noted (Pet. App. 167a), such means were particularly appropriate here, "where many of the victims of the unlawful Union activities were not Union members * * *." "Moreover, where the violations are flagrant and repeated, the publication order * * * [lets] in 'a warming wind of information and * * * reassurance'" (Pet. App. 167a-168a).

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[9] *Local 294, Teamsters* v. *National Labor Relations Board*, 506 F. 2d 1321 (C.A. D.C.), enforcing 203 NLRB 253, 257; *Local 294, Teamsters* v. *National Labor Relations Board*, 506 F. 2d 1321 (C.A. D.C.), enforcing 204 NLRB 700, 708; *Textile Workers Union* v. *National Labor Relations Board*, 388 F. 2d 896, 903-905 (C.A. 2), certiorari denied *sub nom. J. P. Stevens & Co., Inc.* v. *National Labor Relations Board*, 393 U.S. 836; *International Union of Operating Engineers, Local No. 825*, 173 NLRB 955, n. 1, enforced, 420 F. 2d 961 (C.A. 3); *J. P. Stevens Co., Inc.* v. *National Labor Relations Board*, 461 F. 2d 490, 495 (C.A. 4); *Texas Gulf Sulphur Co.* v. *National Labor Relations Board*, 463 F. 2d 778, 779 (C.A. 5).

2. The court of appeals correctly determined that a petition for enforcement of remedies for unfair labor practices did not provide it with jurisdiction to review the Board's decision to revoke the Union's certification.[10] In *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, this Court held that the jurisdictional grant in Section 10(e) and (f) of the Act does not authorize review of a Section 9 certification proceeding by a court of appeals; "Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts * * *" (*id.* at 411). The rationale of that decision applies equally to decertifications. Reviewing the entire structure of the Act, this Court stated, "[t]he statute on its face thus indicates a purpose to limit the review afforded by [Section] 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms" (308 U.S. at 409). Certification issues can become reviewable by

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[10] In September 1974, the Carborundum company filed the unfair labor practice charges on which the Section 8(b)(1)(A) complaint in *Carborundum* was based (Pet. App. 30a) as well as a petition to revoke the Union's certification. The Regional Director denied the petition and the Board rejected the Company's request for review without prejudice to renewal of the request before the Administrative Law Judge in the unfair labor practice proceeding (Pet. App. 33a). The Administrative Law Judge subsequently denied the renewed petition to revoke the certification (Pet. App. 49a). Upon exceptions to that determination, the Board reversed the Law Judge (Pet. App. 62a).

the courts of appeals only if and when they form the basis of an unfair labor practice finding and order. *Id.* at 409-412; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477; Section 9(d) of the Act, 29 U.S.C. 159 (d).[11] They do not become reviewable in the courts of appeals merely because they are consolidated for hearing and decision in a related unfair labor practice proceeding for which enforcement of remedial orders is sought in the court of appeals under Section 10(e) of the Act. The presence of consolidation procedures designed for the efficient processing of related factual claims does not provide a sufficient rationale for frustrating the congressional design that certification determinations not be directly reviewable.[12]

The cases cited by petitioners (Pet. 18-19) involving review of orders requiring the disestablishment of a labor organization found to be employer-domi-

[11] Petitioners did not seek review of the Board's dismissal of the refusal to bargain complaint issued against Carborundum. The court of appeals, although expressing doubt, left open the possibility that, had petitioners done so, or should they do so in the future, this would afford a sufficient basis for obtaining review of the revoked certification (Pet. App. 169a-170a).

[12] Moreover, while, as petitioners point out (Pet. 15), the federal district courts possess limited jurisdiction to review representation determinations where the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188), this power does not enlarge the jurisdiction of the courts of appeals directly to review Board representation determinations.

nated, in violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), are inapposite. In those cases, disestablishment was a remedy for an unfair labor practice. But, as the Board noted in *Hughes Tool Co.*, 104 NLRB 318, 323-324, the unfair labor practice procedures are separate and distinct from the revocation of certification procedures; the only issue in a revocation of certification proceeding is "whether or not the conduct [of the union] is incompatible with the status and obligations of a certified bargaining representative" (*id.* at 323).

3. There is no merit in petitioners' contention that the conduct of the Board proceedings in English denied them their constitutional rights to due process and equal protection (Pet. 21-26). The Board's procedure tracks that of the United States District Court for the District of Puerto Rico, which is statutorily mandated and has been judicially approved.[13] See *United States* v. *DeJesus Boria*, 518 F. 2d 368, 370-371 (C.A. 1); cf. *Carmona* v. *Sheffield*, 475 F. 2d 738 (C.A. 9). Petitioners do not claim that they were denied the opportunity to employ their own translators, or that they are indigent and unable to

[13] This is true even though, in contrast to the Board hearings, the parties before the district court may be individual citizens rather than corporate or union organizations. 48 U.S.C. 864 provides in pertinent part: "All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." The asserted presence of bilingual judges in the district court (Pet. 26) obviously does not change the inability of Spanish speaking parties to understand testimony given in English.

do so. Petitioners complain only that, in a non-criminal proceeding, the Board did not conduct the proceedings in Spanish or provide a translator at the Board's cost to the Union. Petitioners have not demonstrated how they were prejudiced by the Board's failure to provide a translation of the testimony of English-speaking witnesses into Spanish (cf. Pet. 21);[14] during the hearing petitioners never requested such translation. Indeed, most of the witnesses testified in Spanish.[15]

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[14] The Board, however, did "utilize translators whenever a witness did not understand or speak English well enough to testify in English" (Pet. App. 155a, n. 3).

[15] In *Macal*, apart from one witness called by the Union itself and one witness called by the General Counsel simply to identify the Union's agents, only one witness testified in English. In *Carborundum*, apart from two witnesses called by the Company in its own defense against a refusal to bargain complaint, only one witness testified in English. In *Merck-Catalytic*, the Union failed to appear at the hearing after its proposed settlement agreement was rejected by the Administrative Law Judge (Pet. App. 161a-162a). In *Jacobs* only one witness testified in English.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1976.

APPENDIX

Section 10(e) and (f) of the Act, 61 Stat. 147, 148, as amended, 29 U.S.C. 160(e) and (f), provides:

> (e) Petition to court for enforcement of order; proceedings; review of judgment.
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> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on

the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court.

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such

order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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